Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States

PETER HOFFMAN, CINEVISIONS, SEVEN ARTS PICTURES INC., SEVEN ARTS FILMED ENTERTAINMENT LIMITED AND SEVEN ARTS PICTURES PLC,
Petitioners,

v.

JONESFILM,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether principles of state contract law or Federal common law should be used to determine arbitral jurisdiction over a non-signatory to an arbitration agreement in diversity cases where the arbitration agreement expressly provides that state law should govern the interpretation and enforcement of the agreement.

2. Whether principles of state law or Federal law regarding *vacatur* of arbitration awards should govern in diversity cases seeking confirmation of an arbitration award where the arbitration agreement expressly provides that state law should govern the interpretation and enforcement of the agreement.

3. If Federal law regarding *vacatur* may properly be applied in diversity cases seeking confirmation of an arbitration award, even where the arbitration agreement expressly provides that state law should govern the interpretation and enforcement of the agreement, whether the subjective "manifest disregard of the law" standard applied by the Ninth Circuit should be rejected in favor of a clear standard of *vacatur* based on the specific statutory standards of the F.A.A., 9 U.S.C. Section 10 (a)(4).

PARTIES INVOLVED

Petitioners are Peter Hoffman; CineVisions; Seven Arts Pictures Inc.; Seven Arts Filmed Entertainment Limited; and Seven Arts Pictures PLC.

Respondent who was defendant-appellee below is Jonesfilm.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Petitioner makes the following disclosures: CineVisions is an inactive California corporation, 100% of the capital stock of which is owned by Peter Hoffman, an individual residing in the County of Los Angeles. Hoffman owns approximately 70% of the capital stock of Seven Arts Pictures Inc., a Nevada corporation, which owns approximately 30% of the ordinary shares of Seven Arts Pictures PLC, an English public corporation, which in turns owns 100% of the ordinary shares of Seven Arts Filmed Entertainment Limited, an English corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW I

PARTIES INVOLVED II

CORPORATE DISCLOSURE STATEMENT II

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 8

A. Review Is Warranted To Resolve A Conflict Regarding Application Of Federal Or State Law Regarding Arbitral Jurisdiction Over Non-Signatories To An Arbitration Agreement. 11

B. Review Is Warranted To Resolve A Conflict Regarding Application Of Federal Or State Law On *Vacatur* Of Arbitration Awards. 16

C. Review Is Warranted To Resolve A Conflict Regarding Continued Application Of The "Manifest Disregard" Standard Of *Vacatur* Under Federal Law. 20

CONCLUSION 22

Table of Contents -- Continued Page

APPENDIX

Ninth Circuit Memorandum
Dated February 12, 2009 ..... 1a

Ninth Circuit Mandate Dated
April 23, 2009 ..... 7a

Order GRANTING in Part and
DENYING in part Defendant's
Motion for Attorneys' Fees and
Costs Pursuant to F.R.C.P. 54
Dated October 15, 2007 ..... 10a

Order and Judgment Confirming
the IFTA Awards Dated
June 19, 2007 ..... 21a

Order GRANTING IN PART and
DENYING IN PART Defendant's
Motion to Vacate and Modify
Certain Provisions of the IFTA
Arbitration Awards as to Contingent
Sums Owed to Jonesfilm and
Then to Confirm the Entire IFTA
Arbitration Award as so Modified
Dated June 18, 2007 ..... 32a

Order DENYING Plaintiffs' Motion
for Summary Judgment
and Consolidating CV 06-2387-DSF
(JTLx) with this Case Dated
March 1, 2007 ..... 43a

Table of Contents -- Continued Page

Order DENYING Plaintiffs' Motion for Summary Judgment and Consolidating This Action into CV 05-1292 DSF (JTLx) Dated March 1, 2007 ..... 45a

Order DENYING Plaintiffs' Motion for Clarification and/or Reconsideration Dated May 12, 2006..... 48a

Order GRANTING Defendant's Motion to Stay Proceedings Pending Arbitration Dated March 8, 2006..... 50a

Order Amending Memorandum Disposition and Denying Petition for Panel Rehearing and Rehearing En Banc Dated March 25, 2009 ..... 77a

TABLE OF AUTHORITIES

Page(s)

State Cases

Benasra v. Marciano,
91 Cal. App. 4th 987 (2001) 14

Brenelli Amedeo S.p.a. v. Bakara Furniture, Inc.,
29 Cal. App. 4th 1828 (1995) 18

Cronus Investment, Inc. v. Concierge Services,
35 Cal. 4th 375 (2005) 13, 16

Jordan v. Dept. of Motor Vehicles,
100 Cal. App. 4th 431 (2002)
(collecting authorities) 17

Meller & Synder v. R&T Properties, Inc.,
63 Cal. App. 4th 1303 (1998) 18

Moncharsh v. Heely & Blasé,
3 Cal. 4th 1 (1992) 17

O'Flaherty v. Belgun,
115 Cal. App. 4th 1044 (2004) 17

Vandenburg v. Superior Court,
21 Cal. 4th 815 (1999) 19, 20

Table of Authorities -- Continued Page(s)

Federal Cases

Allstate Settlement Corp. v. Rapid Settlements, Ltd.,
559 F.3d 164 (3d Cir. 2009) 13

Arthur Anderson LLP v. Carlisle,
__ U.S. __, 129 S.Ct. 1896 (May 4, 2009) 9, 11, 12, 13, 15

Banque de Paris at Des Pays-Bas v. Amoco Oil Co.,
573 F. Supp. 1464 (S.D.N.Y. 1983)..... 14

Citigroup Global Markets, Inc. v. Beacon,
562 F.3d 349 (5th Cir. 2009)..... 22

Collins v. J.R. Horton, Inc.,
505 F.3d 874 (9th Cir. 2007)..... 20

Comedy Club Inc. v. Improv West Assoc.,
553 F.3d 1277 (9th Cir. 2009)..... 16-17, 22

Comer v. Micor, Inc.,
436 F.3d 1098 (9th Cir. 2006)..... 8, 12, 14

D.H. Blair & Co. v. Gottdiener,
462 F.3d 95 (2d Cir. 2006). 17

Discover Bank v. Vader,
No. 07-773 (March 9, 2009) 15

Electronic Data Systems Corp. v. Donelson,
473 F.3d 684 (2007)..... 17

Table of Authorities -- Continued Page(s)

Erie R. Co. v. Tompkins,
304 U.S. 64 (1938) 14

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 13, 15

Graves v. BP America Inc.,
2009 W.L. 1228012 at *2 (5th Cir.
May 6, 2009) 13

Hall Street Associates L.L.C. v. Mattel, Inc.,
__ U.S. __,
128 S.Ct. 1396 (2008) 10-11, 22

Joint Administrative Committee of the Plumbing and Pipefitting Industry v. Washington Group Int'l, Inc.,
561 F.3d 447 (6th Cir. 2009) 12

Martin Marietta Materials, Inc. v. Bank of Oklahoma,
304 Fed. Appx 360 (6th Cir. 2008) 22

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker,
808 F.2d 930 (2d Cir. 1986) 16

Ramos-Santiago v. United Parcel Services, Inc.,
524 F.3d 120 (1st Cir. 2004) 22

Smith/Enron Cogeneration Ltd. Partnership Inc. v. Smith Cogeneration Int'l Inc.,
198 F.3d 88 (2d. Cir. 1999) 14

Table of Authorities -- Continued Page(s)

Sovak v. Chugai Pharmaceutical Co.,
280 F.3d 1266 (9th Cir.) *amended* 289 F.3d 615 (9th Cir. 2002) *cert. denied* 537 U.S. 825 (2003) 11, 12

Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.,
548 F.3d 85 (2d Cir. 2008) 22

Volt Information Sciences, Inc. v. Board of Trustees, Stanford Univ.,
489 U.S., 468 (1989) 9, 10, 11, 12, 13, 15, 16

W.R. Grace & Co. v. Local 759, United Public Workers of America,
461 U.S. 757 (1983) 16, 17, 21, 22

Wilco v. Swan,
346 U.S. 427 (1953) 21

State Statutes

Cal. Civil Code § 1717 18

Cal. Code of Civil Procedure § 337 18

Cal. Code of Civil Procedure § 989 18

Cal. Code of Civil Procedure § 1021 18

Cal. Code of Civil Procedure § 1280 12

Table of Authorities -- Continued Page(s)

Federal Statutes

9 U.S.C. § 1 2

9 U.S.C. § 10 ..... I, 2, 11, 17, 21

28 U.S.C. § 1254 2

28 U.S.C § 1441 2

U.S. Constitution, Amendment V 2

Other Authorities

California Business & Prof. Code § 16600 17

In the Supreme Court of the United States

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PETER HOFFMAN, CINEVISIONS, SEVEN ARTS PICTURES INC., SEVEN ARTS FILMED ENTERTAINMENT LIMITED AND SEVEN ARTS PICTURES PLC,

Petitioners,

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JONESFILM,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioners respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, contained in its judgment and memorandum opinion dated February 12, 2009, in the matter of *Hoffman, et al v. Jonesfilm*, Docket Nos. 07-56045, 07-56047, 07-566565, 07-55567 ("Memorandum Opinion"). The judgment and opinion in the matter of *Hoffman, et al v. Jonesfilm*, Docket Nos. 07-56045, 07-56047, 07-566565, 07-55567, was entered by the United States Court of Appeals for the Ninth Circuit.

A copy of the Memorandum Opinion is attached hereto at Appendix ("App.") 1a. The opinions and orders of the United States District Court in Cases No. CV 06-2387 and 05-1292 (DSF) dated March 8,

2006, March 1, 2007, June 18, 2007 and June 19, 2007, which were affirmed by the Ninth Circuit's Memorandum Opinion, are unreported and are attached hereto at App. 50a, 45a, 43a, and 21a, respectively ("Orders").

A petition for rehearing and rehearing *en banc* was sought in the Ninth Circuit, and denied on March 25, 2009 (App. 77a). The Mandate for issuance of the judgment was entered by the Ninth Circuit on April 23, 2009.

JURISDICTION

The District Court had subject matter jurisdiction over Petitioner's claims based on diversity of citizenship. 28 U.S.C § 1441(a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

9 U.S.C. § 1, *et. seq.*, known as the Federal Arbitration Act ("FAA"), particularly § 10(a)(4) providing "In any of the following cases, the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -- ... (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

U.S. Constitution, Amendment V, in pertinent part: "No person shall be ... deprived of life, liberty or property without due process of law ..."

STATEMENT OF THE CASE

The United States District Court for the Central District of California (Fischer, J.) issued four orders in the cases of *Seven Arts Pictures, et. al. v. Jonesfilm*, CV No. 05-1292 ("Seven Arts Action") and *Hoffman v. Jonesfilm*, CV No. 06-2387 ("Hoffman Action"): (1) a March 8, 2006 order granting Defendant Jonesfilm's Motion to Stay Proceedings Pending Arbitration ("Arbitration Order"); (2) a March 1, 2007 order denying Plaintiffs' Motion of Summary Judgment in both the Seven Arts Action and the Hoffman Action ("Denial Of Summary Judgment Order"); (3) a June 18, 2007 order granting in part and denying in part Jonesfilm's Motion To Vacate And Modify Certain Provisions Of IFTA Arbitration Award And To Confirm Award As So Modified ("Enforcement of Award Order"); and (4) a June 19, 2007 Enforcement of Award Order that was entered as a final judgment in both the Seven Arts and Hoffman Actions ("Final Order"). Petitioners Seven Arts Pictures Inc., Seven Arts Filmed Entertainment Limited and Seven Arts Pictures plc (collectively, "Seven Arts") were the plaintiffs in the Seven Arts Action. Petitioners Peter Hoffman ("Hoffman") and CineVisions were the plaintiffs in the Hoffman Action. The Seven Arts Action and the Hoffman Action were consolidated by the District Court.

The Seven Arts Action initially sought declaratory relief that an arbitration award (the "First Award"), made on July 20, 2004 and amended August 31, 2004 in Arbitration No. 03-08 before the International Film and Television Alliance ("IFTA") between Lions Gate Films ("Lions Gate"), and Jonesfilm ("First Arbitration"), could not divest Seven Arts of its rights

with respect in the motion picture entitled *9 ½ Weeks II* (the "Picture"). These rights were originally granted via a Distribution Agreement dated November 22, 1995 ("Distribution Agreement") between NTTS Productions Limited ("NTTS") and CineVisions, which was later assigned to Seven Arts as part of the sale of certain assets. The Distribution Agreement contains no arbitration clause.

The First Award at issue in the Seven Arts Action, as relevant here, purported to order "foreclosure" of Jonesfilm's claimed security interest in the Picture pursuant to a Security Agreement between NTTS (not CineVisions or Seven Arts) and Jonesfilm dated October 15, 1995 (hereinafter, "Foreclosure Award"). It also found NTTS alone liable for the attorney fees of both Lions Gate and Jonesfilm based on hearsay testimony alleging misconduct by Hoffman. Neither Hoffman nor any of the other Petitioners here was a party to the First Arbitration nor participated in those proceedings, and the First Award expressly acknowledged that the arbitrator lacked jurisdiction to make findings regarding Hoffman, as he was not a party to the proceedings. Despite this fact, the First Award was confirmed by the Los Angeles Superior Court in a judgment which added Hoffman as an alter ego to NTTS, a corporation which he neither owned nor controlled (the "State Judgment").

Subsequently, Jonesfilm filed a petition in the Seven Arts Action for a second arbitration before IFTA, No. 05-56 ("Second Arbitration") against Seven Arts and CineVisions, alleging as the basis for arbitration an Assignment Agreement dated October 15, 1995 between Jonesfilm and NTTS ("JF/NTTS

Assignment"). Thereafter, Hoffman and CineVisions filed the Hoffman Action seeking declaratory relief that any relief against them or CineVisions' assignees in the Second Arbitration was barred by *res judicata* (merger and bar from the First Award and State Judgment), the statute of limitations (which clearly had run), the requirements of due process of law and California law limiting attorney fee awards.

Seven Arts and Hoffman were not parties to the JF/NTTS Assignment that included the IFTA arbitration clause. CineVisions signed the JF/NTTS Assignment not as a principal but as a surety, and was discharged as a surety on entry of the State Judgment under California law, since CineVisions was not named in the First Arbitration or the State Judgment. Jonesfilm's petition in the Second Arbitration sought to enforce both the Foreclosure Order and the First Attorney Fee Order against Seven Arts and CineVisions, and in addition sought to recover substantial damages and attorney fees by reason of Jonesfilm's allegations that CineVisions owed a substantial additional participation to Jonesfilm from distribution of the Picture under the terms of the JF/NTTS Assignment ("Picture Revenue Claim"), a claim not raised in the Seven Arts Action. Jonesfilm sought to stay the Seven Arts Action pending resolution of the Second Arbitration, and Petitioners sought to enjoin the Second Arbitration. The District Court entered the Arbitration Order requiring arbitration of the issues raised in the Seven Arts and Hoffman Actions, as well as the new issues raised by Jonesfilm. The Arbitration Order was entered only in the Seven Arts Action but was applied by the court to both the Seven Arts and Hoffman Actions.

Seven Arts and Hoffman did not participate in the Second Arbitration, but CineVisions appeared with a full reservation of rights. All these parties filed an objection to arbitral jurisdiction, asserting that the Second Arbitration was barred by *res judicata* and the statute of limitations. The Arbitrator made two awards (the "Second Awards"), one dated January 16, 2007 holding Seven Arts and CineVisions liable for both the foreclosure award and the attorney fee aspects of the First Award, and one dated June 22, 2007 denying the Picture Revenue Claim but granting Jonesfilm's request for substantial additional attorney fees incurred in the Second Arbitration. The Arbitrator stated that the basis for the second attorney fee award (even though CineVisions was the prevailing party on the Picture Revenue Claim) was an indemnity clause in the JF/NTTS Assignment ("Indemnity Clause") under which NTTS agreed to indemnify and hold Jonesfilm harmless from any breach of the Assignment by NTTS.

Following the January 16, 2007 arbitration decision, Petitioners filed Motions for Summary Judgment in both the Seven Arts Action and the Hoffman Action. The district court denied these motions in its Denial of Summary Judgment Order. This order was based on the district court's view that the Motions for Summary Judgment were "in effect, seeking to vacate the arbitrator's award . . . [which] is properly obtained through a motion to vacate." The district court never ruled on the substantive issues raised in Petitioners' Motions for Summary Judgment which were based on the Distribution Agreement (which contains no arbitration clause) and on principles of *res judicata*, statute of limitations

and due process of law, and which did not seek *vacatur* of the First or Second Awards.

Jonesfilm then moved to vacate and modify that portion of the Second Awards denying the Picture Revenue Claim and to enforce the second attorney fee award. On June 18, 2007, the district court granted in part and denied in part Jonesfilm's motion in its Enforcement of Award Order. The court denied Jonesfilm's motion to vacate and modify the Second Awards. However, the court also (i) reaffirmed its determination that arbitral jurisdiction existed over Petitioners, despite the fact that they were not signatories to the arbitration agreement, relying almost exclusively on federal authorities, and (ii) confirmed the Second Awards without addressing Petitioners' substantive arguments in opposition that the awards should not be confirmed on numerous grounds solely because those arguments were raised to the arbitrator in the context of Petitioners' objections to jurisdiction rather than in a statement of defense. The district court thus refused to make an independent determination whether Petitioners' arguments raised valid grounds for *vacatur* under the FAA statutory standards or applicable state law standards for *vacatur*.

Petitioners in both the Seven Arts and Hoffman Actions appealed to the Ninth Circuit from each of these Orders.

On February 12, 2009, the Ninth Circuit issued a Memorandum Opinion (App. 1a) affirming the district court's orders challenged here. The Court of Appeals, first, applied Federal common law principles to assess arbitral jurisdiction, and found that, even as non-signatories, Petitioners were "bound by the

agreement [providing for arbitration] under the ordinary contract principles of estoppel and alter ego."[1] App. 4a. In support of this conclusion, the Ninth Circuit neither cited nor discussed any California decisions or other state authorities, instead relying exclusively on its own prior decision in *Comer v. Micor, Inc.*, 436 F.3d 1098, 1102-02 (9th Cir. 2006), which in turn failed to cite or discuss any state decisions or authority. Second, the Ninth Circuit found that there "was not a manifest disregard of the law" in the arbitrator's decision "not to consider" Petitioners' arguments simply because Petitioners objected to arbitral jurisdiction and accordingly did not file a Statement of Defense in the Second Arbitration. Moreover, the Ninth Circuit (like the district court) refused to even make a determination whether Petitioners' arguments independently raised valid grounds for *vacatur* under the FAA statutory standards or under applicable state law *vacatur* standards.

Petitioners filed a petition for rehearing and for rehearing *en banc*, which was denied on March 25, 2009.

REASONS FOR GRANTING THE PETITION

This Petition presents three important issues regarding the legal standards that should be applied in federal diversity cases seeking to compel or confirm arbitration awards where the arbitration agreement at issue expressly provides for the application of state law, as to which there is

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[1] The District Court made no alter ego finding and took no evidence on that issue.

substantial uncertainty and confusion in the Federal courts.

First, the Federal courts have reached inconsistent and confusing conclusions regarding whether Federal or state law should be applied in determination of arbitral jurisdiction over non-signatories to an arbitration agreement, when the arbitration agreement selects the application of state law (California law in this case) and makes no reference to the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* ("FAA"), in a case arising under diversity jurisdiction. There currently exists a conflict among the Circuit Courts of Appeal and between decisions of the California Supreme Court and the Federal courts regarding both the standards for establishing arbitral jurisdiction over non-signatories and whether state contract law or Federal common law should govern the issue. This uncertainty and confusion is reflected in the divergence among the Circuit Courts of Appeal in their application of this Court's directive that Federal courts should apply state law in determining a party's right to arbitral jurisdiction, particularly when state law is chosen in the agreement. *See Arthur Anderson LLP v. Carlisle*, __ U.S. __, 129 S.Ct. 1896, 1903 (May 4, 2009) ("*Arthur Anderson*") ("... [if] a written arbitration agreement is made enforceable against (or for the benefit of) a third party under state contract law, the [FAA's] terms are fulfilled...") (emphasis added); *see also Volt Information Sciences, Inc. v. Board of Trustees, Stanford Univ.*, 489 U.S. 468, 474-77 (1989) (holding that the FAA does not preempt state law in an arbitration based on a contract that selects state law, as "... there is no federal policy requiring arbitration under a certain set of procedural rules; the federal

policy is simply to ensure enforceability, according to these terms, of private agreements to arbitrate..."). Petitioners respectfully ask this Court to clarify the uncertainty in the law by holding that state law, not Federal common law, governs the question of arbitral jurisdiction over non-signatories to an arbitration agreement that provides for application of state law.

Second, similar uncertainty and confusion exists regarding whether Federal or state law provides the applicable grounds for *vacatur* in such cases. This uncertainty is reflected in the Memorandum Opinion and the Orders and in conflicting decisions among the Federal courts regarding the standards for entitlement to *vacatur* of an arbitration award in cases submitted to arbitration based upon an arbitration agreement that provided for the application of state law, in spite of this Court's opinion in *Volt*, 489 U.S. at 474-77. Petitioners respectfully ask this Court to clarify the uncertainty in the law by holding that state law, not Federal law, provides the applicable standard for *vacatur* in diversity cases seeking enforcement of an arbitration award where the arbitration agreement expressly provided for the application of state law to its interpretation and enforcement.

Third, even if Federal law is found to govern the standard for *vacatur* in diversity actions in which the arbitration agreement at issue provided for the application of state law, this case presents a question left unaddressed by this Court, except in dicta, regarding the propriety or continued application of the "manifest disregard of the law" standard for *vacatur* under the FAA, particularly after this Court's decision in *Hall Street Associates L.L.C. v. Mattel,*

Inc., __ U.S. __, 128 S.Ct. 1396, 1404 (2008) ("*Hall Street*"). There is a clear conflict in the Circuits on this issue. Petitioners respectfully request this Court to reject the subjective "manifest disregard of the law" standard for *vacatur* in favor of an objective test authorized by this Court's precedents and the statutory standards of the FAA, 9 U.S.C. § 10 (a)(4).

A. Review Is Warranted To Resolve A Conflict Regarding Application Of Federal Or State Law Regarding Arbitral Jurisdiction Over Non-Signatories To An Arbitration Agreement.

The Federal courts are inconsistent in the application of Federal law under the FAA, 9 U.S.C. §1 *et. seq*, or state law in determining arbitral jurisdiction over non-signatories to an arbitration agreement in diversity actions despite a "choice of law" clause (in the contract providing for arbitration) selecting state law, in apparent disregard of this Court's decisions in *Arthur Anderson*, 129 S.Ct. at 1903, and *Volt*, 489 U.S. at 474-77. Certain Circuit Courts of Appeal apparently read *Volt* in a very limited sense as relating only to "procedural" rules but preempting state law on the issue of arbitral jurisdiction over non-signatories, even if state law is chosen as the governing law in the contract, as discussed below. *See, e.g., Sovak v. Chugai Pharmaceutical Co.*, 280 F.3d 1266, 1270 (9th Cir.) *amended* 289 F.3d 615 (9th Cir. 2002), *cert. denied* 537 U.S. 825 (2003) (choosing to follow FAA on a "procedural" rule, not Illinois law chosen in the contract at issue). But *Volt* is not so limited, particularly as followed in *Arthur Anderson*, and does not prohibit application of

state law as the basis for determining the "enforceability" of arbitration agreements.

In this case, the Ninth Circuit in the Memorandum Opinion followed Federal law in finding arbitral jurisdiction over non-signatories when the applicable contract chose application of California law and did not provide for arbitration pursuant to the FAA. *Comer v. Micor*, 436 F.3d 1098, 1101-09 (9th Cir. 2006), relied on in the Memorandum Opinion as the sole basis for its affirmance of the finding of arbitral jurisdiction over the petitioners, analyzed enforceability against non-signatories solely under Federal law. In the Arbitration Order, the District Court ruled that *Volt* held that only one provision of California law, *i.e.*, the California Arbitration Act, Cal. Code of Civil Procedure. § 1280, *et seq.* ("CAA"), was not preempted by the FAA, and therefore did not require the District Court to follow California law on the grounds for findings of arbitral jurisdiction over non-signatories. The Memorandum Opinion did not comment on the applicability of *Volt*, or *Arthur Anderson* (decided after the Memorandum Opinion was issued).

Other Courts of Appeal have reached differing conclusions on the applicability of state law in determining whether an arbitration agreement is enforceable against a non-signatory. The Sixth Circuit followed the *Comer* and *Sovak* decisions and applied only Federal law to determine whether non-signatories are bound under an arbitration agreement in *Joint Administrative Committee of the Plumbing and Pipefitting Industry v. Washington Group Int'l, Inc.*, 561 F.3d 447, 452 (6th Cir. 2009). But other Courts of Appeal have applied state law in

making such determinations or avoided the issue by holding state and Federal law would require the same outcome. *See Allstate Settlement Corp. v. Rapid Settlements, Ltd.*, 559 F.3d 164, 170 (3d Cir. 2009) (following *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), which stated that "...[when] deciding whether the parties agreed to arbitration a certain matter ... courts generally... apply ordinary state-law principles...") ("*First Options*"); *Graves v. BP America Inc.*, 2009 W.L. 1228012 at *2 (5th Cir. May 6, 2009). This conflict and confusion in the Circuits is widespread and continuing, and is amplified by inconsistent conclusions by state courts. For example, the California courts have directly and definitively held that the CAA, not the FAA, applies in California actions regarding enforcement of arbitration agreements, thus establishing a direct conflict with authority in the Federal District and Circuit Courts. *See Cronus Investment, Inc. v. Concierge Services*, 35 Cal. 4th 375, 389-90 (2005) ("*Cronus*"). Only this Court can clarify this matter.

Volt is not limited as held in the Arbitration Order, and *Volt* and *Arthur Anderson* (decided after the Arbitration Order and the Memorandum Opinion) represent clear rulings by this Court that "there is no federal policy requiring arbitration under a certain set of procedural rules; the federal policy is simply to ensure enforceability, according to their terms, of private agreements to arbitrate...," *Volt*, 489 U.S. at 474, 109 U.S. at 1253-54, and that upon application of "state contract law, the [FAA's] terms are fulfilled." *Arthur Anderson*, 129 S.Ct. at 1903. This conclusion is particularly applicable when, as here, the basis of Federal jurisdiction is diversity, a jurisdiction under which Federal courts normally must apply state law.

See, e.g., Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). There is no basis for Federal preemption by the FAA of state arbitration procedures and substantive law in a diversity action interpreting a contract which itself chooses state (here California) law. There is no basis for a Federal court to refuse to enforce this "choice of law" clause in a diversity action merely because the subject of the dispute relates to the arbitration clause. Petitioners suggest this issue is uncertain and ambiguous both in the Ninth Circuit and other Circuits, as well as in state courts which continue to apply the standards of state arbitration acts.

In this case, the District Court in the Arbitration Order and the Ninth Circuit in the Memorandum Opinion found arbitral jurisdiction over Petitioners as non-signatories to the JF/NTTS Assignment, on a motion made by respondent to compel arbitration, by application of the expansive jurisdiction over non-signatories developed by Federal courts under the FAA, particularly *Banque de Paris at Des Pays-Bas v. Amoco Oil Co.*, 573 F. Supp. 1464 (S.D.N.Y. 1983), *Smith/Enron Cogeneration Ltd. Partnership Inc. v. Smith Cogeneration Int'l Inc.*, 198 F.3d 88, 97 (2d. Cir. 1999) (Arbitration Order), and *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101-02 (9th Cir. 2006) (Memorandum Opinion).

California law, however, denies arbitral jurisdiction by a signatory against a non-signatory (the case at issue here), absent a finding of "third party beneficiary" status (of which there was none in this case). *E.g., City of Hope v. Bryan Cave LLP*, 102 Cal. App. 4th 1356, 1369-70 (2002); *Benasra v. Marciano*, 91 Cal. App. 4th 987, 990 (2001). The California cases are in fact legion on this issue. The

Memorandum Opinion does not discuss, cite or mention applicable California law regarding arbitral jurisdiction over non-signatories, erroneously relying upon Federal law to address the question of whether a non-signatory can be bound by an arbitration agreement that specifies the application of state law.

Even if *Volt* is construed as having more limited reach, the issue of whether a third party is bound to arbitration of a particular issue is an issue of law for the courts under this Court's ruling in *First Options*, 514 U.S. at 944, and is not a "procedural" issue that some Circuit Courts have found to be outside of the mandate of *Volt* regarding application of state law. If the JF/NTTS Assignment is to be "governed by California law" and makes no reference to the FAA, then the scope of its arbitration clause should equally be governed by California law, particularly in a case arising under diversity jurisdiction, as was held in *Volt* and *Arthur Anderson*. This Court has recently reaffirmed that the FAA gives no basis for Federal jurisdiction, *see Discover Bank v. Vader*, No. 07-773 (March 9, 2009). Slip Op. at 7-8.

This Court's guidance is necessary to establish the governing law in diversity actions raising issues of enforcement of arbitration clauses against non-signatories when as here the contract providing for arbitration chooses state law, and in cases concerning contracts with no choice of law provision but where Federal jurisdiction is based on diversity of citizenship.

B. Review Is Warranted To Resolve A Conflict Regarding Application Of Federal Or State Law On *Vacatur* Of Arbitration Awards.

A similar confusion and uncertainty exists regarding the basis for *vacatur* in a diversity action in Federal courts seeking enforcement of an arbitration award made pursuant to a contract choosing state law (as is the case here). The Memorandum Opinion applies only the standard of whether the arbitrator in the Second Arbitration made a "manifest disregard of the law," a limited Federal rule of *vacatur* which applies only when it is established that the arbitrator both was aware of a clear principle of law and intentionally decided to ignore it. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986). This decision is in conflict with *Cronus* and *Volt* and reflects the same confusion and uncertainty among the Circuits discussed above regarding the application of Federal or state law regarding jurisdiction over non-signatories.

The Ninth Circuit appears to apply this "manifest disregard" test as the exclusive basis for *vacatur* of an arbitration award which does not follow the applicable law, even in a diversity action based on a contract selecting state law. The Ninth Circuit now apparently does not make a separate determination as to whether the award violates "public policy that is well-defined and dominant by reference to the laws and legal precedents...," a ground for *vacatur* this Court enunciated in *W.R. Grace & Co. v. Local 759, United Public Workers of America*, 461 U.S. 757, 766 (1983) ("*Grace*"). *See, e.g., Comedy Club Inc. v. Improv West Assoc.*, 553 F.3d 1277 (9th Cir. 2009)

("*Comedy Club*") (applying the "manifest disregard" rule to vacate an award by reason of California Business & Prof. Code § 16600, relating to covenants not to compete, as opposed to the *Grace* standard. The conflict and confusion between the "public policy" and "manifest disregard" standards for *vacatur* are also apparent in opinions from two other circuits, *Electronic Data Systems Corp. v. Donelson*, 473 F.3d 684, 688 (2007) and *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 100-11 (2d Cir. 2006).

California courts do not recognize the "manifest disregard" rule and instead vacate awards if the arbitrator "exceeded his powers when he acts in a manner not authorized by the contract or by law," including the "issuance of an award that violates a statutory right" or "selects a remedy not authorized by law," basically following the express statutory language of 9 U.S.C. § 10(a)(4). *Jordan v. Dept. of Motor Vehicles*, 100 Cal. App. 4th 431, 443 (2002) (collecting authorities); *O'Flaherty v. Belgun*, 115 Cal. App. 4th 1044, 1055-56 (2004), both following the leading case of *Moncharsh v. Heely & Blasé*, 3 Cal. 4th 1, 32-33 (1992) (finding *vacatur* permitted if the award violates an "explicit legislative expression of public policy"). The California test is direct and does not introduce an ambiguous "subjective" standard as set forth in Federal "manifest disregard" case law: it focuses on whether the award violates a specific "statutory right" or "explicit legislative expression of public policy."

Here the Second Award violates four "specific" and "explicit" California statutory rights or legislative expressions of California public policy:

A. The Second Award alleges the same cause of action against Petitioners as was alleged in the First Arbitration and is therefore barred under clear California public policy regarding *res judicata* as bar or the prohibition on "splitting" causes of action. *See Brenelli Amedeo S.p.a. v. Bakara Furniture, Inc.*, 29 Cal. App. 4th 1828, 1835 (1995); *Meller & Synder v. R&T Properties, Inc.*, 63 Cal. App. 4th 1303, 1309 (1998) (Cal. Code of Civil Procedure Section 989 limits "splitting" causes of action against joint debtors only to the specific terms of that statute).

B. The Second Award is barred by the applicable California statute of limitations, Cal. Code of Civil Procedure Section 337(1), since the Second Arbitration was brought more than four years after the alleged actionable conduct.

C. The Second Award awards attorney fees to Respondent (the only financial award at issue) even though neither the JF/NTTS Assignment nor any statute provides for award of legal fees (thus violating clear California public policy on awards of attorney fees as set forth in Cal. Code of Civil Procedure Section 1021) and even though Petitioners were the prevailing party in the Second Arbitration, having defeated Respondent's claim of more than $1,000,000 of additional royalties (thus violating clear California public policy awarding attorney fees only to the prevailing party in contract disputes, Cal. Civil Code Section 1717).

D. The Second Award holds Petitioners responsible for the attorney fees ordered in the First Award without a new proceeding and giving collateral estoppel effect to the First Award against non-parties in violation of California public policy set

forth in *Vandenburg v. Superior Court*, 21 Cal. 4th 815, 834 (1999) ("*Vandenburg*") (based on due process issues, no arbitration award can have collateral estoppel effect against a non-party).

The Memorandum Opinion does not cite, discuss or mention applicable California law regarding *vacatur*. Despite the four clear and undeniable violations of California public policy and statutory rights in the Second Award, the Memorandum Opinion finds that the arbitrator did not "manifestly disregard the law" under Federal law because Petitioners filed no Statement of Defense in the Second Arbitration raising these issues, refusing to consider Petitioners' written objections to jurisdiction of the Second Arbitration, their first filing in the Second Arbitration, which raised issues A and B above. Issues C and D were not raised, of course, because obviously Petitioners could not know to object to an award of attorney fees that would not be made until later, at the end of the arbitration process.

The Memorandum Opinion does not cite or discuss the "public policy" basis for *vacatur*. But the Memorandum Opinion suggests that any violation of public policy may be disregarded in *vacatur* proceedings based on the fact that the issue may not have been properly raised at the outset of the arbitration proceeding in a particular form, even with (1) no showing that such a procedure is either required by the applicable arbitration rules (in fact that procedure is not required by IFTA as a condition to raising the issue) or (2) no showing that the arbitrator in fact relied on such a failure in overruling the objection (here the arbitrator made no such reliance).

The uncertainty and confusion in the "manifest disregard" standard of *vacatur* is also illustrated in the Memorandum Opinion discussion of the Ninth Circuit opinion in *Collins v. J.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007). *Collins* held that arbitrators must apply *res judicata* principles (seemingly supporting Petitioners' arguments on that issue) or be found to have "manifestly disregarded the law" (as opposed to violation of public policy) but that arbitrators have discretion in application of non-mutual offensive collateral estoppel -- which is not only irrelevant to the *res judicata* claim made by Petitioners but which is inconsistent with applicable California law (*i.e., Vandenburg*).

Petitioners have thus been unfairly denied the opportunity to have their arguments for vacating the arbitration award, which were based upon state law standards that should have been applicable according to the arbitration agreement's choice of law provision, considered on their merits. Petitioners respectfully request that this Court resolve the confusion among the Federal and state courts regarding application of state or Federal law standards for vacating arbitration awards in diversity cases where the arbitration agreement provided that state law, not the FAA, would govern the interpretation and enforcement of the agreement.

C. Review Is Warranted To Resolve A Conflict Regarding Continued Application Of The "Manifest Disregard" Standard Of *Vacatur* Under Federal Law.

If the Court determines that the Circuit Courts should follow Federal law regarding *vacatur*, then Petitioners request this Court to abandon the

"manifest disregard of the law" standard applied by the Ninth Circuit in favor of an objective standard of whether the award "exceeded the powers of the arbitrator," in particular by an award made in violation of clear explicit and well-settled public policy. The confusion and uncertainty regarding the "manifest disregard" standard for *vacatur* in Federal cases is fundamentally this: is the issue for *vacatur* the clear applicability of the legal right involved or rather the process that the arbitrator used to determine that the public policy or contract is somehow not applicable? Is the issue the importance of the legal right involved, or perhaps its relative proximity to traditional control of remedies, or is the issue whether the arbitrator made a reasoned consideration of the issue? Petitioners suggest that the "manifest disregard" standard is, as a matter of law, an impermissibly subjective and uncertain rule, which can be applied in arbitrary fashion, and as a result should be abandoned in favor of the *Grace* rule, based as it is in the specific statutory language of the FAA, 9 U.S.C. § 10 (a)(4), or at least, abandoned for those cases involving "choice of law" clauses not selecting Federal law or when Federal jurisdiction is based on diversity of citizenship.

This Court has never given considered review to the "manifest disregard" standard of *vacatur*, which was announced long ago by this Court only in *dicta* in *Wilco v. Swan*, 346 U.S. 427, 436 (1953) (later overruled on other grounds). The Ninth Circuit approach -- which used the "manifest disregard" standard in lieu of the "clear and dominant" public policy standard or any express application of Section 10(a) of the FAA -- surely exacerbates the difficulties in application of the "manifest disregard" standard of

vacatur. Petitioners request a clear statement from this Court of what grounds are permissible for *vacatur*, when state law is chosen in the contract providing for arbitration or in actions for which Federal jurisdiction is based on diversity of citizenship.

Further, the Ninth Circuit has determined that the "manifest disregard" standard survives this Court's decision in *Hall Street Associates L.L.C. v. Mattel, Inc.*, __ U.S. __, 128 S.Ct. 1396, 1404 (2008) ("*Hall Street*"). *See Comedy Club*, 553 F.3d at 1289-90. Other circuits have come to different conclusions. *Compare Ramos-Santiago v. United Parcel Services, Inc.*, 524 F.3d 120, 124 n.3 (1st Cir. 2004) (expressed doubt on the issue); *Martin Marietta Materials, Inc. v. Bank of Oklahoma*, 304 Fed. Appx 360, 362 (6th Cir. 2008) (notes split in the Circuits); *Citigroup Global Markets, Inc. v. Beacon*, 562 F.3d 349, 358 (5th Cir. 2009) (specifically abandons "manifest disregard of the law" standard) *with Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 548 F.3d 85, 90 (2d Cir. 2008) (follows Ninth Circuit). Granting this Petition provides a basis for this Court's review of this important yet unsettled area of law to provide more specific guidance on the proper standard for granting *vacatur*, by reference to the clear standard set forth in *Grace* or in the express terms of the FAA or controlling California law under the CAA.

CONCLUSION

The application of state or Federal law to the issue of whether non-signatories may be bound to an arbitration agreement which chooses state law in an action based on diversity, and the proper standard for

vacatur of arbitration awards in such cases, are important questions of Federal law which have not been, but should be, settled by this Court. The continued application of the "manifest disregard of the law standard" for *vacatur* under Federal law has resulted in a conflict among the Circuits and has not been, but should be, settled by this Court. Petitioners, therefore, respectfully request this Court grant *certiorari* to review the Memorandum Opinion of the Ninth Circuit dated February 12, 2009.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
FEB 12 2009
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

D.C. No. CV-05-01292-DSF

SEVEN ARTS PICTURES PLC,
an English No. 07-56045 Corporation; et al.,
Plaintiffs - Appellants,
v.
JONESFILM, a Pennsylvania joint venture,
Defendant – Appellee,

D.C. No. CV-05-01292-DSF

SEVEN ARTS PICTURES PLC,
an English No. 07-56047 Corporation; et al.,
Plaintiffs - Appellees,
v.
JONESFILM, a Pennsylvania joint venture,
Defendant - Appellant.

D.C. No. CV-05-01292-DSF

SEVEN ARTS PICTURES PLC,
a English No. 07-56656 Corporation; et al.,
Plaintiffs - Appellees,
v.
JONESFILM,
Defendant - Appellant.

D.C. No. 2:05-cv-01292-DSF-JTL

SEVEN ARTS PICTURES, INC.,
a Nevada corporation
CINEVISIONS,
a California corporation; et al.,
Plaintiffs - Appellants,
v.
JONESFILM, a New York corporation,
Defendant - Appellee.

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Submitted February 2, 2009[1]
Pasadena, California

Before: HALL, SILVERMAN and CALLAHAN, Circuit Judges.

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[1] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

MEMORANDUM[2]

Peter Hoffman, CineVisions, Seven Arts Pictures, Inc., and Seven Arts Pictures PLC (collectively "Appellants") appeal multiple district court orders concerning an arbitration between Appellants and Jonesfilm regarding movie sequel rights. In those orders, the district court first stayed the proceedings pending arbitration, and then, after the arbitration had taken place, denied Appellants' motion for summary judgment and confirmed the arbitration award. Jonesfilm cross-appeals the district court's denial of its motion to vacate and modify that part of the arbitration award which had denied Jonesfilm any net receipts from the sequels. The parties are familiar with the facts of this case, and we repeat them only to the extent necessary to understand our disposition. We have jurisdiction pursuant to 9 U.S.C. § 16(a)(I)(D)-(E), (2) and 28 U.S.C. §§1291, 1292(a). We affirm on all issues.

We consider three claims made by Appellants. They argue that the district court erred by (1) requiring them to submit their claims to arbitration; (2) denying their motion for summary judgment and enforcing the arbitration award, including the first and second attorney's fees awards and the foreclosure award; and (3) finding them in civil contempt and awarding sanctions against them for their failure to comply with the court's order confirming the

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[2] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

arbitration award. We find none of their arguments persuasive and affirm the district court's decisions.

Regarding Appellants' first claim, the Federal Arbitration Act required the court to determine the dispute's arbitrability. *See* 9 U.S.C. §§ 2,3 (2000); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205,1212-13 (9th Cir. 1998). Here, the dispute was arbitrable because Appellants were bound by the arbitration agreement in the Jonesfilm/NTTS Agreement and because the sequel rights at issue in their federal claims stemmed from that agreement. Appellant CineVisions was bound as a "joint and several obligor" of the Jonesfilm/NTTS Agreement.

The Seven Arts companies and Hoffman, though nonsignatories, were bound by the agreement under the ordinary contract principles of estoppel and alter ego. *See Comer v. Micor, Inc.*, 436 F.3d 1098, 1101-02 (9th Cir. 2006). Appellants were bound to arbitrate their federal claims because the rights they sought to confirm include rights granted in the Jonesfilm/NTTS Agreement, which Appellants received through a series of assignments from NTTS. The position they take on those rights also implicates Jonesfilm's rights in the Jonesfilm/NTTS Agreement.

Regarding Appellants' second claim, Appellants make similar arguments claiming error in the district court's denial of their motion for summary judgment and in its confirmation of the arbitration award. The district court properly denied Appellants' motion for summary judgment as an improper vehicle for vacating an arbitration award. *See* 9 U.S.C. § 10 (2000). In the context of the arbitration award, the

arbitrator decided not to consider Appellants' arguments after Appellants failed to file a Statement of Defense containing those arguments, as required. This decision was proper under the arbitration rules Appellants were bound by and, thus, was not a "manifest disregard of the law" that would support vacating the arbitration award. *See Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007) (permitting the vacation of awards which exhibit "manifest disregard of the law").

Finally, Appellants' third claim likewise fails. The court did not abuse its discretion by finding Appellants in civil contempt and awarding sanctions against them, given Appellants' failure to comply with the court's order enforcing the arbitration award. *See Go-Video, Inc. v. Motion Picture Assoc. of Am.*, 10 F.3d 693,695 (9th Cir. 1993); *FTC v. Affordable Media, LLC*, 179 F .3d 1228, 1239 (9th Cir. 1999); *Perry v. O'Donnell*, 759 F.2d 702,704-05 (9th Cir. 1985).

We consider one cross-claim made by Jonesfilm, which contends that the district court erred in confirming that portion of the arbitrator's award which found no net receipts due to Jonesfilm. We disagree. While Hoffman did engage in deplorable attempts to intimidate witnesses testifying in the net receipts proceeding, all parties, including the arbitrator, were aware of those threats prior to that proceeding. *See A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1404 (9th Cir. 1992) ("[W]here the ... undue means is not only discoverable, but discovered and brought to the attention of the arbitrators, a disappointed party will

not be given a second bite at the apple."). Furthermore, even if Jones film could show that the arbitrator in the second arbitration was threatened by Hoffman's lawsuits against the arbitrator in the previous arbitration, those threats permeated the entire proceeding, not just the net receipts portion, and, thus, do not justify vacating or modifying a portion only.

In conclusion, we **AFFIRM** the district court on all issues.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
APR 23 2009
MOLLY C. DWYER, CLERK OF COURT
U.S. COURT OF APPEALS

D.C. No. CV-05-01292-DSF

SEVEN ARTS PICTURES PLC, an English Corporation; SEVEN ARTS FILMED ENTERTAINMENT LIMITED, an English corporation; SEVEN ARTS PICTURES PLC, an English corporation; PETER MILES HOFFMAN; CINEVISIONS, a California corporation,
Plaintiffs - Appellants,
v.
JONESFILM, a Pennsylvania joint venture,
Defendant - Appellee.

D.C. No. CV-05-01292-DSF

SEVEN ARTS PICTURES PLC, an English Corporation; SEVEN ARTS FILMED ENTERTAINMENT LIMITED, an English corporation; SEVEN ARTS PICTURES PLC, an English corporation; PETER MILES HOFFMAN; CINEVISIONS, a California corporation,
Plaintiffs - Appellees,
v.
JONESFILM, a Pennsylvania joint venture,
Defendant - Appellant.

D.C. No. CV-05-01292-DSF

SEVEN ARTS PICTURES PLC, an English Corporation; SEVEN ARTS FILMED ENTERTAINMENT LIMITED, an English corporation; SEVEN ARTS PICTURES PLC, an English corporation; PETER MILES HOFFMAN; CINEVISIONS, a California corporation,
Plaintiffs - Appellees,
v.
JONESFILM,
Defendant - Appellant.

D.C. No. 2:05-cv-01292-DSF-JTL

SEVEN ARTS PICTURES, INC., a Nevada corporation; CINEVISIONS, a California corporation; PETER MILES HOFFMAN an individual; SEVEN ARTS FILMED ENTERTAINMENT LIMITED, an English corporation,
Plaintiffs - Appellants,
v.
JONESFILM, a New York corporation,
Defendant - Appellee.

MANDATE

The judgment of this Court, entered *02/12/2009*, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41 (a) of the Federal Rules of Appellate Procedure.

Cost awarded to Appellee in the amount of$1120.60.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

/s/ Theresa Benitez
By: Theresa Benitez
Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF.CALIFORNIA

DOCKETED ON CM
OCTOBER 15, 2007
BY 176

CV 05-1292 DSF (JTLx) Consolidated With CV 06-2387 DSF (JTLx)

October 15, 2007

SEVEN ARTS PICTURE, INC. et al.
v.
JONESFILM

CIVIL MINUTES-GENERAL

Present: The Honorable DALE S. FISCHER, United States District Judge

Paul D. Pierson, Deputy Clerk
Not Present: Court Reporter
Attorneys Present for Plaintiffs: Not Present
Attorneys Present for Defendant: Not Present

PROCEEDINGS: (In Chambers) Order GRANTING in Part and DENYING in Part Defendant's Motion for Attorneys' Fees and Costs Pursuant to F.R.C.P. 54

The matter before this Court is Defendant's Motion for Attorneys' Fees and Costs Pursuant to Federal Rule of Civil Procedure 54. Defendant requests attorneys' fees and costs in connection with

(i) defending Jonesfilm against multiple actions filed by Seven Arts Pictures, Inc., Cinevisions, and Peter Hoffman - including the February 9, 2006 Third Amended Complaint (the "Seven Arts Action"), (ii) removing Hoffman and Cinevisions' state court proceeding to federal court, consolidating it with the Seven Arts Action, and staying both actions pending arbitration, (iii) defending Jonesfilm against summary judgment motions, and (iv) confirming and entering judgment on arbitration awards. (Mot. 5:17-6:14.) For the following reasons, the Court GRANTS in part and DENIES in part Defendant's Motion for Attorneys' Fees and Costs.

I. FACTS

On October 15, 1995, Defendant Jonesfilm entered into an agreement with NITS Productions Ltd. ("NTTS/Jonesfilm Agreement") regarding the rights to produce sequels to the motion picture *9 1/2 Weeks*. (See Exs to Supp. Sept. 2007 Decl. of Barry L. Goldin, Esq. in Supp. of Mot. of Def./J. Creditor Jonesfilm for Att'ys' Fees and Costs ("Goldin Decl.") Ex. E.) The rights and obligations under that agreement were subsequently transferred to the Plaintiffs in these consolidated actions. (See Mar. 8, 2006 Order GRANTING Def.'s. Mot. To Stay Proceedings Pending Arbitration ("Stay Order") 4-5; Supp. Mem. 2:21-3:17.)

A series of disputes arose from the transfer of those rights and Plaintiffs' failure to pay fees due under the NTTS/Jonesfilm Agreement. (See Stay Order 5-8). After repeated dismissals, Plaintiffs filed the Seven Arts Action on February 9, 2006, seeking declaratory relief regarding Plaintiffs' rights under

the NTTS/Jonesfilm Agreement. (Id. at 7-8.) That action was subsequently stayed by the Court pending the outcome of arbitration initiated by Defendant before the Independent Film & Television Alliance ("IFTA") pursuant to the NTTS/Jonesfilm Agreement. (See id at 14.) While that action was stayed, Plaintiffs Peter M. Hoffman and Cinevisions instituted a state court proceeding seeking similar declaratory relief. That action was removed to the Central District of California as Hoffman, et al. v. Jonesfilm, CV 06-2387 DSF (JTLx,) (the "Hoffman Action"), consolidated with the Seven Arts Action, and stayed. (See Sept. 12, 2006 Order DENYING Mots. of Def. Jonesfilm To Confirm the June 22, 2006 Findings of Fact, J. and Partial Award of the IFTA Arb. and DENYING Pls.' Mots. for Summ. J. at 7.)

On June 22, 2006, the IFTA arbitrator issued a partial award granting Defendant certain declaratory and equitable relief. (See Goldin Decl. Ex. A.). On January 16, 2007, the arbitration was concluded and the arbitrator issued a final award confirming the partial award and awarding Jonesfilm additional indemnity. (See Goldin Decl. Ex. B.). On June 18, 2007, the Court confirmed those awards in its Order and Judgment Confirming the IFTA Awards. (See June 18, 2007 Order GRANTING IN PART and DENYING IN PART Def.'s Mot. To Vacate and Modify Certain Provisions of the IFTA Arbitration Awards as to Contingent Sums Owed to Jonesfilm and Then To Confirm the Entire IFTA Arbitration

Award as so Modified ("Arbitration Award Order") 6.)[1]

Defendant now seeks attorneys' fees and costs incurred in defending itself in the Seven Arts Action and Plaintiffs' earlier actions, removing the Hoffman Action from state court, consolidating the Hoffman Action with the Seven Arts Action, staying both actions pending arbitration, defending Jonesfilm against summary judgment motions, and confirming and entering judgment of the IFTA arbitration awards. (Mot. 5: 17 -6: 14.)

II. LEGAL STANDARD

Rule 54(d)(1) of the Federal Rules of Civil Procedure provides that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs."

"Rule 54(d)(2) [of the Federal Rules of Civil Procedure] creates a procedure but not a right to recover attorneys' fees." MRO Commc'ns, Inc. v: Am. Tel. & Tel Co. 197 F.3d 1276, 1280 (9th Cir. 1999). Rule 54(d)(2) provides that "[c]laims for attorneys' fees and related non-taxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial ... [T]he motion must be filed no later than 14 days after entry

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[1] The Court declines Plaintiffs' invitation to reconsider its decision to confirm the IFTA arbitration awards. (See Supp. Opp'n 8-1-11.).

of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought." Fed. R. Civ. P. 54(d)(2) (emphasis added).

Attorneys' fees are generally not recoverable unless authorized by a rule, statute or contract. MRO Commc'ns, 197 F.3d at 1281.

III. DISCUSSION

A. Jonesfilm Is Not Entitled to Attorneys' Fees

Defendant seeks attorneys' fees incurred in defending itself in the Seven Arts Action and Plaintiffs' earlier actions, removing the Hoffman Action from state court, consolidating the Hoffman Action with the Seven Arts Action, staying both actions pending arbitration, defending Jonesfilm against summary judgment motions, and confirming and entering judgment of the IFTA arbitration awards. (Mot. 5:17-6:14.) In order for Jonesfilm to be entitled to attorneys' fees, however, it must demonstrate that such an award is authorized by the NTTS/Jonesfilm Agreement. See MRO Commc'ns, 197 F.3d at 1281. Defendant contends that it is entitled to attorneys' fees pursuant to section four of the NTTS/Jonesfilm Agreement, which provides in relevant part:

> Purchaser [NTTS] hereby agrees to defend, indemnify and otherwise hold Owner [Jonesfilm] and its employees, officers, directors, agents, representatives, successors, licensees and assigns free and harmless from and

> against any and all liabilities, claims, demands, damages (including reasonable attorneys' fees and costs whether or not litigation is commenced) arising out of or resulting from any breach by Purchaser of any term or condition of this Agreement or the representations and warranties set forth herein or any production based on the Property.

(Goldin Decl. Ex. E § 4; Mot. 3:7-13; Supp. Mem. 2:3-10.) The NTTS/Jonesfilm Agreement contains a California choice of law provision. (See Goldin Decl. Ex. E § 14.) Plaintiffs are liable for NTTS' obligations under the NTTS/Jonesfilm Agreement. (Supp. Mem. 2:25 -3: 17; Goldin Decl. Ex. A Finding No. 39, Ex. B at 2-3, 7-8, Ex. E §15, Ex. 0 at 6.) However, the attorneys' fees requested in this motion are not recoverable because they do not arise out of or result from any breach by Plaintiffs of the NTTS/Jonesfilm Agreement or "any production based on the Property." (Goldin Decl. Ex. E § 4.)[2]

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[2] For the purposes of this motion, the Court assumes that the indemnity provision in section four of the NTTS/Jonesfilm Agreement applies to suits between the indemnitor and indemnitee. The Court does not need to decide this issue because attorneys' fees are not recoverable for the other reasons stated in this Order. The Court also need not address Defendant's contention that the Court's prior determination to confirm the IFTA Arbitrator's award of attorneys' fees constitutes "law of the case" (see Supp. Mem. 9:24 - 10:2) because that determination would also not affect the outcome of this motion.

1. Attorneys' Fees Are Not Recoverable Because They Do Not Arise Out of or Result from any Breach by Plaintiffs of the NTTS/Jonesfilm Agreement

Defendant claims that the requested attorneys' fees arise out of the IFTA Arbitrator's findings that Plaintiffs breached the NTTS/Jonesfilm Agreement by failing to (i) provide distribution agreements to Jonesfilm, (ii) require all distribution agreements to provide for irrevocable payment of all sums to the collection account, (iii) hold all collections in escrow, and (iv) hold collections in trust for Jonesfilm. (Supp. Mem. 10:17-24; Goldin Decl. Ex. A Finding No. 35.) Defendant states that "[b]ut for those breaches of the [NTTS/Jonesfilm] Agreement, this litigation would not have occurred." (Supp. Mem. 10:23-24.) The Court declines to adopt such an expansive interpretation of the indemnity clause. The attorneys' fees recoverable for the abovementioned breaches were already awarded to Defendant by the arbitrator and confirmed by the Court. (See Goldin Decl. Ex. A Award Nos. 4 and 7, Ex. B at 7-8; Arbitration Award Order 5-6.) The Court declines to extend those breaches to further indemnify Defendant against Plaintiffs' litigations before this Court or to indemnify against fees incurred in the confirmation of the IFTA arbitration awards.

Defendant also claims that Plaintiffs' refusal to arbitrate amounted to a breach of the NTTS/Jonesfilm Agreement's arbitration clause. (See Supp. Mem. 10:25-13:9; Goldin Decl. Ex. E §14.) Under California law, a "refus[al] to arbitrate" can amount to a "breach [of] the arbitration agreement." See Brown v. Dillard's, Inc., 430 F.3d 1004, 1010-12

(9th Cir. 2005). However, to the extent Plaintiffs' refusal to arbitrate amounted to a breach of contract, the damages arising out of or resulting from that breach would have been remedied by the attorneys' fees awarded to Defendant by the arbitrator and confirmed by the Court. (See Goldin Decl. Ex. A Award Nos. 4 and 7, Ex. B at 7-8; Arbitration Award Order 5-6.) The Court declines to construe Plaintiffs' litigations before this Court as additional breaches of contract warranting further indemnification under the NTTS/Jonesfilm Agreement. Similarly, the attorneys' fees incurred in the confirmation of the IFTA arbitration awards were not a result of a breach of contract based on Plaintiffs' refusal to arbitrate and therefore do not warrant indemnification.

2. Attorneys' Fees Are Not Recoverable Because They Do Not Arise Out of or Result from any "Production Based on the Property".

Defendant claims that the requested attorneys' fees arise out of or result from "any production based on the Property." (Supp. Mem. 13:10-14:21; Goldin Decl. Ex. E §4.) The NTTS/Jonesfilm Agreement defines "Property" as including sequels to *9 ½ Weeks* and other motion picture rights, (see Goldin Decl. Ex. E at 1), but does not define "production." (See id.) Defendant contends that, because Plaintiffs' litigations before this Court pertain to sequels of *9 ½ Weeks*, Defendant's attorneys' fees must be indemnified because they arise out of or result from Plaintiffs' claims with respect to those sequels. (Supp Mem. 13:10-14:21.)

Hoffman, who drafted the indemnity provision (Supp. Opp'n 5:25-26; Supp Reply 8:11-14), contends

that the litigations before this Court "have nothing to do with production of [sequels to *9 ½ Weeks*]" and that the indemnity was only intended to apply "if some party involved in the production of [a sequel to *9 ½ Weeks*] brought a claim against [Defendant] (e.g. an actor, director, technical staff or rights holder)." (Supp. Opp'n 7:22-28.) Defendant contends that (i) Plaintiffs misconceive the use of the word "production" as a verb instead of as a noun, (ii) that construing the word "production" as a noun would provide for indemnification for any claims arising out of sequels to *9 ½ Weeks*, and (iii) that Defendant intended the indemnity clause "to mean exactly what it says." (Supp. Reply 7:2-8:14; Supp. Sept. 2007 Decl. of Barry L. Goldin, Esq. in Supp. of Mot. of Def./J. Creditor Jonesfilm for Att'ys' Fees and Costs ¶¶16-19.)

"Interpretation of a contract is a matter of law, including whether the contract is ambiguous." United States v. King Features Entm't, Inc., 843 F.2d 394, 398 (9th Cir. 1988). The Court concludes that the phrase "any production based on the Property" is clear and unambiguous and that Defendant's strained construction is incongruous with the plain language of the agreement. Defendant's proposed construction would render the work "production" superfluous, because as Defendant admits, its construction of the indemnity would require Plaintiffs to indemnify Jonesfilm "for any claims arising out of [or] resulting from the Second and Third [sequels to *9 ½ Weeks*]." (Supp. Reply. 7:22-24) The Court declines to adopt such a construction.

Having considered the extrinsic evidence submitted by the parties in their supplemental

briefing, the Court "finds the language of the contract is not reasonably susceptible to [Defendant's] asserted interpretation." King, 843 F.2d at 398. The extrinsic evidence therefore "cannot be received for the purpose of varying the terms of the contract." Id.

Defendant is not entitled to the requested attorneys' fees because the fees do not arise out of or result from "any production" based on sequels to *9 ½ Weeks*.

B. Jonesfilm. Is Only Entitled to Those Costs of Suit Contained in its Bill of Costs

Rule 54(d)(1) of the Federal Rules of Civil Procedure provides:

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys fees shall be allowed as of course to the prevailing party unless the court otherwise directs...Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Defendant timely lodged its Bill of Costs with the Clerk of the Court on July 3, 2007 pursuant to Local Rule 54-3. The Clerk of the Court filed the Bin of Costs on July 19, 2007 and Plaintiffs served no timely objection. As the prevailing party in this litigation, Defendant is entitled to the $670.00 in costs included in its Bill of Costs.

Defendant, however, is not entitled to the additional costs it seeks pursuant to section four of the NTTS/Jonesfilm Agreement. As discussed above, the indemnification provision in that agreement provides no basis for such recovery.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Attorneys' Fees and Costs Pursuant to Federal Rule of Civil Procedure 54 is GRANTED in part and DENIED in part. The Court GRANTS Defendant's request for the costs of suit in the amount of $670.00, as identified in its Bill of Costs. The Court DENIES Defendant's request for attorneys' fees and for additional costs not included in its Bill of Costs.

IT IS SO ORDERED.

INITIALS OF CLERK: ___

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
CLERK, U.S. DISTRICT COURT
JUN 19, 2007
CENTRAL DISTRICT OF CLAIFORNIA
BY DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
JUNE 20, 2007
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

Case No,: CV 05-1 292-DSF (JTLx)
Consolidated With
Case No.: CV 06-2387-DSF (JTLx)

SEVEN ARTS PICTURES, INC., a Nevada corporation; SEVEN ARTS FILMED ENTERTAINMENT LIMITED, an English corporation; SEVEN ARTS PICTURES, PLC, an English Corporation,
Plaintiffs
v.
JONESFILM, a Pennsylvania joint venture,
Defendant

PETER HOFFMAN, an individual and
CINEVISIONS, a California corporation,
Plaintiffs,
v.
JONESFILM, a Pennsylvania joint venture
Defendant

ORDER AND JUDGMENT CONFIRMING THE IFTA AWARDS

Defendant and counterclaimant Jonesfilm's Motion to Vacate and Modify Certain Provisions of the IFTA Arbitration Awards as to Contingent Sums Owed to Jonesfilm and Then to Confirm the Entire IFTA Arbitration Awards as So Modified came on regularly for hearing on June 4, 2007 before the Honorable Dale S. Fischer. The Court reviewed and considered all papers filed by counsel regarding this matter, including without limitation the "Findings of Fact, Judgment, and Partial Award" dated June 22, 2006 (the "Partial Award") and the Supplemental and Final Award as Corrected and Clarified January 16,2007 (the "Final Award") of Stephen S. Strick, Esq., the Arbitrator of the Independent Film & Television Alliance ("IFTA"), in IFTA Case No. 05-56 entitled *Jonesfilm* v. *Cinevisions, Seven Arts Pictures, Inc., Seven Arts Filmed Entertainment Limited, and Seven Arts Pictures PLC* (collectively, the "IFTA Awards"), and such oral argument as the Court deemed appropriate.

IT IS HEREBY ORDERED that the Partial Award and the Final Award are confirmed in favor of Jonesfilm and against Respondents Cinevisions, Seven Arts Pictures, Inc., Seven Arts Pictures Filmed

Entertainment Limited, and Seven Arts Pictures PLC, jointly and severally; and

IT IS FURTHER ORDERED that Jonesfilm is hereby granted against Respondents Cinevisions, Seven Arts Pictures, Inc., Seven Arts Pictures Filmed 20 Entertainment Limited, and Seven Arts Pictures PLC, jointly and severally, all of the equitable, injunctive, declaratory, monetary, and other relief set forth in paragraphs 1 through 15 of Section F (entitled "Judgment and Partial Award") on pages 18 through 22 of the June 2006 IFTA Award; and

IT IS FURTHER ORDERED that, as used in this Order and Judgment:

> "Jonesfilm/NTTS Agreement" means the Agreement dated as of October 15, 1995 between Jonesfilm and NTTS Productions Ltd. ("NTTS"), countersigned by Cinevisions.
>
> "Jonesfilm/NTTS Security Agreement" means the Security Agreement dated as of October 15, 1995 between Jonesfilm and NTTS.
>
> "Respondents" means Cinevisions (a California corporation), Seven Arts Pictures, Inc. (a Nevada corporation), Seven Arts Filmed Entertainment Limited (a United Kingdom corporation), and Seven Arts Pictures PLC (a United Kingdom corporation), and each of them.

"Mortgage of Copyright" means the Mortgage of Copyright dated as of October 15, 1995 of NTTS in favor of Jonesfilm.

"NTTS/Cinevisions Agreement" means that certain Agreement dated as of November 22, 1995 between, on the one hand, NTTS/Odessa Films and, on the other hand, Cinevisions.

"First Picture" means that certain motion picture entitled 9 ½ Weeks starring Mickey Rourke and Kim Basinger, produced during the mid-1980's and owned by Jonesfilm.

"Second Picture" means that certain motion picture entitled 9 ½ Weeks II aka Another 9 ½ Weeks aka Love in Paris. starring Mickey Rourke and Angie Everhart, produced in or about 1996, as a sequel to the First Picture.

"Third Picture" means that certain made-for video film entitled The First 9 ½ Weeks produced during 1997 by or for Lions Gate Films.

IT IS ORDERED AND ADJUDGED that, in accordance with the Partial Award, Jonesfilm is hereby granted the following relief against Respondents, jointly and severally:

1. None of Respondents owns any future sequel, prequel, remake, title, character, or other rights in or to the First Picture, the Second Picture, or the Third Picture. The sequel option under § 10 of

the Jonesfilm/NTTS Agreement has expired and all rights under § 10 of the Jonesfilm/NTTS Agreement have reverted to Jonesfilm.

2. Upon and as a result of the assignment of all NTTS rights to Cinevisions, any and all rights of Cinevisions against NTTS under the NTTS/Cinevision Agreement were merged into the rights of NTTS.

3. An "Event of Default" (as defined in the Jonesfilm/NTTS Security Agreement) has occurred and has not been cured; NTTS has not paid the December 2004 Judgment against it for $290,911 and accrued interest thereon due Jonesfilm; Jonesfilm has properly foreclosed on its "valid first priority security interest in" and exercised its other remedies under the Jonesfilm/NTTS Security Agreement and related Mortgage of Copyright, and there has been and is assigned and transferred to and vested in, and there belongs to and is owned by, Jonesfilm all right, title, and interest of any and all of Respondents in and to any and all of the Collateral (defined in the Jonesfilm/NTTS Security Agreement as supplemented by the Mortgage of Copyright) including without limitation the Second Picture, all the copyrights and copyright renewals and extensions with respect to the Second Picture, all the distribution agreements to the Second Picture (including the NTTS/Cinevisions Distribution Agreement and all other distribution, sub-distribution, licensing, and other agreements of any or all of Respondents for distribution, broadcast, exhibition, or other exploitation of the Second Picture or rights therein) and all receivables therefrom, and all other results and proceeds with respect to the

Second Picture. For the avoidance of doubt, the rights foreclosed upon, acquired, and owned by Jonesfilm include (without limitation) all rights of NTTS, Cinevisiol11s, and any other Respondents (whether or not those rights have been merged) in, to, or under the NTTS/Cinevisions Agreement.

4. Jonesfilm is entitled to, and is awarded, damages against Cinevisions and the other Respondents, jointly and severally, of all amounts which should have been but were not paid to Jonesfilm under the Jonesfilm/NTTS Agreement from the date(s) such amounts were required to have been paid to Jonesfilm. Each of Respondents is so jointly and severally liable to Jonesfilm, and Jonesfilm is granted judgment against each of the Respondents, jointly and severally, for the prior AFMA Award of $290,911 and accrued interest thereon at the statutory rate of 10% per annum from July 20, 2004 (the date of the prior Arbitration Award against NTTS, which Award was subsequently confirmed by Judgment of the California Superior Court).

5. Respondents were required to deposit and hold in escrow funds received under the Jonesfilm/NTTS Agreement. Also, all payments received by Respondents from distribution of the Second Picture after the occurrence of an Event of Default under the Jonesfilm/NTTS Security Agreement were required to be "received in trust for [Jonesfilm's] benefit, ... segregated from [Respondent's] other funds and ... promptly paid over to [Jonesfilm]." Imposition of a constructive trust and a constructive and equitable lien are confirmed on (i) those funds that Respondents were required but failed to so hold in escrow or in trust, (ii) the property for which those funds were disbursed, and (iii) the

proceeds thereof. See Cal. Civ. Code §§ 2223-2224. Respondents are ordered to provide, within 10 days after the date of service of this Order, a complete, true, and accurate accounting and tracing of those funds into the property for which those funds were disbursed and proceeds thereof, and for enforcement of Jonesfilm's constructive trust and constructive and equitable lien with respect thereto.

6, Respondents, jointly and severally, shall provide to and for Jonesfilm reasonable access to and permit Jonesfilm to inspect and audit the books and records of Respondents and their affiliates and also their licensing agents or representatives (including Screen Media Ventures) with respect to the Second Picture by an accountant, auditor, and/or other representative or representatives reasonably chosen by Jonesfilm and to copy such of those books and records as and when Jonesfilm or such accountant, auditor, or other representative may from time to time reasonably deem necessary or advisable (whether as to collections received or receivable, disbursements, tracing of funds or other property, or otherwise)

7. As set forth on page 3 of the Partial Award, the IFTA Tribunal's February 10, 2006 Order granted a preliminary injunction that:

> Respondents Cinevisions, Seven Arts Pictures, Inc., Seven Arts Filmed Entertainment Limited, Seven Arts Pictures, PLC, and all of their respective officers, directors, employees, agents, and affiliates are hereby enjoined from transferring, assigning or in any way disposing of, through any means,

> any right, title, or interest in or to the picture originally known as *9 ½ Weeks II,* but later also known as *Another 9 ½ Weeks* or *Love in Paris*....

Any pledge, assignment, or other transfer of any right, title, or interest in violation of that February 10, 2006 preliminary injunction of the IFTA Tribunal or its other Orders (whether Respondents pledge to any international hedge fund or otherwise) is null and void and is of no force and effect (and thus this Court declares null and void and of no force or effect the purported grant by Respondents of among other things, a security interest in the Collateral to the hedge fund referred to in Respondents' February 21, 2006 press release).

8. Respondents, and each of them, is ordered to:

> (a) immediately deliver to Jonesfilm aU physical elements of tile Second Picture (e.g., the negative, interpositive, internegative, out-takes, sound materials, video masters, trailers, marketing materials, dialogue lists, dubbing materials, dubbing masters and the like) and all documents relating to contracts (whether third party distribution agreements, laboratory access letters, related correspondence, or otherwise), elements, and other materials (whether advertising or promotional materials or otherwise) with respect to the Second Picture;
>
> (b) immediately deliver to Jonesfilm documents identifying the location of all laboratories, warehouses, and other locations

where any physical elements, advertising and promotional materials, and other materials for distribution and exploitation of the Second Picture are stored or otherwise kept, and promptly and timely provide Jonesfilm, as and when Jonesfilm from time to time reasonably requests, all such documentation and other materials as may reasonably be required so that Jonesfilm has unobstructed access thereto; and

(c) immediately and permanently remove from their websites and from any other advertising, promotional, or other material any implication that Respondents have any right, title, or interest (whether as distributor or otherwise) in or to the Second Picture or other Collateral (as defined in the Jonesfilm/NTTS Security Agreement as supplemented by the Mortgage or Copyright).

9. Respondents, and each of them, is enjoined as follows:

(a) from purporting to have or transfer any right, title, or interest in or to the Second Picture; any copyright, elements, advertising or promotion material, distribution agreement, or proceeds with respect to the Second Picture; and/or any other Collateral under the Jonesfilm/NTTS Security Agreement or the Mortgage of Copyright;

(b) from preventing, disrupting, or otherwise interfering with access, use or exploitation by Jonesfilm or Jonesfilm's

successors and assigns with respect to any physical elements, advertising, promotional or other materials, or other documents or information for or otherwise relating to the Second Picture;

(c) from preventing, disrupting, or otherwise interfering with distribution or other use or exploitation of the Second Picture or other Collateral by Jonesfilm or Jonesfilm's successors or assigns; and

(d) from purporting to have or transfer any option for or other right, title, or interest in or to any additional sequel, prequel, remake or other right under the Jonesfilm/NTTS Agreement, as any such right has expired and all such rights have reverted to Jonesfilm.

10. Jonesfilm is granted Judgment in the amount of $246, 186.53 from and against each of the Respondents, jointly and severally, under the mandatory indemnity provisions of the Jonesfilm/NTTS Agreement for the IFTA filing fees, arbitrator fees, court reporter fees, and other reasonable attorneys' fees and costs, of the IFTA arbitration (consisting of the $131,752.56 awarded in Award No.7 on pp. 19-20 of the Partial Award and the additional $114,433.97 awarded on pp. 7-8 of the Final Award).

11. This Order and Judgment (including, without limitation, all awards and other relief in this Order and Judgment) fully applies to and is fully binding on:

(a) each of the Respondents;

(b) each Respondent's successors; and

(c) anyone to whom any Respondent purports to transfer Oil" assign, or which purports to receive from any Respondent, any right, title, or interest in funds, rights, collateral, or other property (i) with respect to the Second Picture, (ii) that may be subject to lien of or held in constructive trust for Jonesfilm under this Order and Judgment, or (iii) that may otherwise be subject to this Order and Judgment.

12. Except as otherwise set forth herein, interest shall accrue at the legal rate of 10% per annum from the January 16, 2007 date of the Final Award.

13. This Order and Judgment is rendered without prejudice to Jonesfilm's rights, if any, to assert appropriate claims and seek appropriate relief in a court of competent jurisdiction and as stated in the IFTA Rules of International Arbitration.

IT IS SO ORDERED.

Dated: 6-19-07

/s/Dale S. Fischer
DALE S. FISCHER
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF.CALIFORNIA

DOCKETED ON CM
June 20, 2007
BY 012

CV 05-1292 DSF (JTLx)
June 18, 2007

SEVEN ARTS PICTURE, INC. et al.
v.
JONESFILM

CIVIL MINUTES-GENERAL

Present: The Honorable DALE S. FISCHER, United States District Judge

Paul D. Pierson, Deputy Clerk
Not Present: Court Reporter
Attorneys Present for Plaintiffs: Not Present
Attorneys Present for Defendant: Not Present

Order GRANTING IN PART and DENYING IN PART Defendant's Motion to Vacate and Modify Certain Provisions of the IFTA Arbitration Awards as to Contingent Sums Owed to Jonesfilm and Then to Confirm the Entire IFTA Arbitration Award as so Modified

I. INTRODUCTION

This matter is currently before the Court on Defendant Jonesfilm's Motion to Vacate and Modify Certain Provisions of the IFTA Arbitration Awards as to Contingent Owed to Jonesfilm and Then to Confirm the Entire IFTA Arbitration Award as so ("Motion").

The Court previously held that the parties' dispute was arbitrable, and was governed by either the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, or California[1] (March 8, 2006 Order Granting Defendant's Motion to Stay Proceedings Pending Arbitration 8-9, issued in consolidated case no. 05-1292 DSF (JTLx).) The Court stayed the instant action pending completion of the arbitration. (Id., at 14.) On June 26, 2006, the IFTA arbitrator issued a partial award ("Partial Award") *inter alia* granting Defendant certain declaratory and equitable relief. (See Exhibits to Declaration of Barry Goldin, Esq. ("Goldin Exs.") Ex. A.) On January 16, 2007, the arbitration was concluded and the arbitrator issued a final award ("Final Award") confirming the Partial Award and awarding Jonesfilm additional indemnity. (See Goldin Exs. Ex. B.)

In the Final Award, the arbitrator addressed whether Defendant is entitled to contingent compensation ("Net Receipts") for revenues derived by Plaintiffs for exploitation of the rights to the film *Another 9 ½ Weeks* (the "First Sequel"). (Goldin Exs. Ex. B 67.) The arbitrator determined that the revenues derived by Plaintiffs were offset by the

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[1] The Court declined to make a final choice of law determination after concluding that the same result would be dictated under either federal or California law.

production costs of the First Sequel, and that Defendant was therefore not entitled to any contingent compensation. (Goldin Exs. Ex. B 67-68.)

Defendant now seeks confirmation of all declaratory, equitable, and other relief granted in the Partial and Final Awards. (Mot. I.) However, Defendant seeks to vacate and have modified the Net Receipts portion of the Final Award. (Id.)

The Court GRANTS in part and DENIES in part Defendant's Motion.

II. LEGAL STANDARD

Vacatur or modification of an arbitrator's ruling is properly obtained through a motion to vacate or modify. See 9 U.S.C. §§ 10-11; Cal. Code Civ. Proc. §§ 1286.2, 1286.6 Courts review an arbitrator's findings of fact and conclusions of law using an extremely deferential standard: a federal court may vacate or modify an arbitration award *only* if the award is completely irrational, exhibits a manifest disregard of law; or otherwise falls within one of the grounds set forth by the FAA or California Code of Procedure § 1289.2. G.C. & K.B.Invs., Inc. v. Wilson, 326 F.3d 1096, 1105 (9th Cir. 2003); Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 11, 27 (1992).

An arbitration award may be vacated pursuant to the FAA and California Code of Procedure if (1) the award was procured by corruption, fraud or other undue means, the arbitrator was corrupt, (3) the arbitrator was guilty of misconduct which prejudiced the rights of moving the party, or (4) the arbitrator

exceeded his powers. 9 U.S.C. § 10(a)(1)-(4); Cal Code Civ. Proc.§ 1286.2(a)(1)-(4).

An arbitration award may be modified pursuant to the FAA and California Code. Civil Procedure if (1) there was an evident material miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award, (2) the arbitrator exceeded his power, but the award may be corrected without affecting the merits of the decision, or (3) the award is imperfect in matter of form, not affecting the merits of the controversy. 9 U.S.C. § 11 (a)-(c); Cal. Code Civ. Proc. § 1286.6(a)-(c).

III. ANALYSIS

A. Vacatur and/or Modification of the Arbitrator's Final Award

Defendant raises three grounds for vacating or modifying the Net Receipts portion the Final Award: (I) the arbitrator's finding is contrary to the evidence; (2) the arbitrator "evidently miscalculated" the Net Receipts; and (3) the arbitrator's findings procured by "undue means." Defendant's arguments are unavailing.

1. The Arbitrator's Finding is Not Contrary to the Evidence

Defendant first contends that the Net Receipts portion of the Final Award is contrary to the evidence considered by the arbitrator. (Mot. 18-19.) According to Defendant, the arbitrator disregarded evidence supporting the conclusion that Net Receipts in the

amount of $825,765 are owed to Defendant. (Id. at 18-20.) Contrary to Defendant's claim, the arbitrator considered all the evidence submitted by the parties regarding Net Receipts. The arbitrator explicitly noted "the introduction of conflicting evidence with regard to the cost of the First Sequel and permissible deductions from Gross Revenues for purposes of calculating Claimant's share of Net Revenues." (Goldin Exs. Ex. B 68.) The arbitrator weighed Defendant's evidence against testimony and documentary evidence from Steve Ransohoff and Marian Sales that revenues from exploitation of the film did not outstrip the film's production costs. (Id, at 67-68.) After considering the competing evidence, the arbitrator determined "that the cost of production of the First Sequel was greater than Gross Revenues derived from its exploitation," (Id. at 68.) The Court declines to disturb the arbitrator's considered findings of fact.

2. The Arbitrator did not Commit an "Evident Miscalculation" of the Net Receipts

Defendant next claims that the arbitrator's reliance on the Ransohoff letter caused him to miscalculate the Net Receipts. According to Defendant, the letter lists costs that should be excluded when calculating Net Receipts. (Mot. 19-20.) For example, Defendant contends that a $700,000 producer fee listed in the Ransohoff letter was "explicitly required by the Jonesfilm/NTTS Agreement to be excluded from production costs." (Id.)

What costs are properly considered in calculating Net Receipts is a question of fact that has

nothing to do with the arbitrator's mathematical calculations. As discussed above, the Court is not inclined to disturb the arbitrator's considered findings of fact.

Even if the Court delves into the minutia of the Net Receipts calculation, Defendant's argument finds no support in the facts. For example, the Jonesfilm/NTTS Agreement provides:

> "Net Receipts" shall be all sums derived by [Plaintiffs] from exploitation of the First Sequel (including all amounts paid or required to be paid in the Collection Account, or to the production lender) *less third party out-of-pocket costs of collection, withholding taxes, etc and third party participations approved by Owner less only the cost of production of the First Sequel as approved by the completion bond company* (plus the amount of any "enhancements" permitted under Paragraph 5 hereto), expressly excluding any fees to Purchaser or its affiliates. Purchaser agrees to defer all fees and compensation due to it with respect to the First Sequel....

(Goldin Exs. Ex. E. 95-96.) The $700,000 producer fee is not expressly excluded from the calculation of Net Receipts. It was therefore not irrational for the arbitrator to include the $700,000 production cost in his calculations.

Defendant also ignores the fact that the arbitrator's calculations were not based entirely on the Ransohoff letter. As previously discussed, the arbitrator also relied on the witness testimony of Ransohoff and Marian Sales to calculate Net Receipts. Defendant has failed to establish that the arbitrator miscalculated Net Receipts.

3. The Arbitrator's Award was not Procured by Undue Means

i. Plaintiffs' failure to turn over discovery materials

Defendant argues that the Net Receipts portion of the Final Award should be vacated because it was obtained by "undue means." During the arbitration, the arbitrator issued several subpoenas ordering Plaintiffs to produce documents relating to revenues derived from the First Sequel (the "Discovery"). (Goldin Decl. ¶¶65-67.) Plaintiffs refused to comply. (Id.) Defendant now claims that it was improper for the arbitrator to calculate Net Receipts without first obtaining the Discovery[2] (Mot. 22-23.)

---

[2] Defendant, citing National Casualty Co. v. First State Insurance Group, 430 F.3d 492, 499 (1st Cir. 2005), also contends that the arbitrator was required to make an "adverse inference" against Plaintiffs because of their failure to produce the Discovery. (Mot. 23.) In National Casualty, the arbitrator made an adverse inference about the contents of documents that a party refused to disclose. However, nothing in the First Circuit's ruling confirming the arbitration *requires* that an arbitrator make such an inference under similar circumstances. Defendant has submitted no Ninth Circuit decision that imposes a "negative inference" requirement.

In order to justify vacating an arbitration award because of "undue means," the moving party must show that the "undue means" were "(1) not discoverable upon the exercise of due diligence prior to the arbitration, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence." Lafarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334, 1339 (9th Cir. 1986).

"An obvious corollary to the first prong of the test ... is that where the ... undue means is not only discoverable, but discovered and brought to the attention of the arbitrator, a disappointed party will not be given a second bite at the apple." A.G. Edwards & Sons. Inc. v. McCollough, 967 F,2d 1401, 1404 (9th Cir. 1992).

In this case, Defendant admits that the alleged "undue means" - Plaintiffs' refusal to provide the subpoenaed discovery - were known to both Defendant and the arbitrator from the outset of the arbitration. (See Goldin Decl. ¶¶54-59, 66-71.) As a curative measure the arbitrator held hearings to ascertain the revenue derived by Plaintiffs' exploitation of the First Sequel. (See Goldin Exs. Ex. B 68.) The arbitrator was satisfied the information adduced at the hearing allowed him to calculate Net Receipts, (Id.) Defendants then filed a post-hearing brief and subsequently, a post-Award "Request to Correct Errors," detailing the various arguments raised in the instant motion. (Goldin Exs. Exs. NN, OO.) The arbitrator reviewed and rejected Defendant's arguments. The Court declines to give Defendant a "second bite at the apple."

ii. Plaintiffs' alleged threats and intimidation

Defendant also contends that the Net Receipts portion of the Final Award was improperly procured by other "undue means" - *i.e.,* intimidation and coercion. Defendant alleges that, almost from the inception of the arbitration process, Plaintiffs attempted to secure a favorable award by threatening to file costly civil litigation against the arbitrator and various witnesses. (Mot. 24,)

If Plaintiffs' strategic use of intimidation and coercion had been successful then presumably both the Partial and Final Awards would have favored Plaintiffs and Defendant would not have been awarded its hotly contested fees. Defendant, however, claims that Plaintiffs' alleged misconduct affected only the Net Receipts portion of the Final Award. Defendant cannot have it both ways; either the entire Final Award should be vacated because it was procured by undue means or the entire Final Award should be confirmed. Defendant clearly does not seek the former result (see Mot. 1), and the Court is left only to consider whether the Final and Partial Awards should be confirmed in their entirety.

B. Confirmation of the Arbitrator's Partial and Final Awards

Plaintiffs assert that the Court should decline to confirm the arbitrator's Partial and Final Awards because (1) the arbitrator had no jurisdiction over Plaintiffs Seven Arts Pictures Inc., Seven Arts Filmed Entertainment Limited, and Seven Arts Pictures PLC (collectively "Seven Arts"), (2) Seven Arts is not a

proper party to the action and did not participate in the arbitration, and (3) the arbitrator exhibited a manifest disregard for law and public policy.

Plaintiffs first assert that the arbitrator had no jurisdiction over Seven Arts, and therefore exceeded his powers in granting relief against Seven Arts in the Awards. The Court considered and rejected this jurisdictional argument in its March 8. 2006 Order Granting Defendant's Motion to Stay Proceedings Pending Arbitration, and declines now to reconsider its Order.

Plaintiffs next contend that Seven Arts is not a party to the action and did not participate in the arbitration, and that consequently Defendant is required to file a petition for confirmation of the Awards. Not so. Seven Arts *is* a party to the action – *i.e.*, it is a named plaintiff in the Third Amended Complaint (Goldin Exs. Ex. DD), and the Court previously determined that Seven Arts' claims were arbitrable (Order 11-14). Moreover, despite Plaintiffs' protestations to the contrary, Seven Arts participated in the arbitration when it agreed to "present [its] case based on the evidence and documents submitted by Cinevisions." (Goldin Exs. Exs. A 43, Z.) .

Finally, both the Partial and Final Awards contain thorough and well-supported findings of fact and conclusions of law. The Awar.ds are not completely irrational, exhibit no manifest disregard for the law or public policy, and do not otherwise fall within any of the grounds set forth by the FAA or California law for vacating an arbitration award.

The Court therefore confirms both the Partial and Final Awards.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion is DENIED to the extent it seeks to vacate or modify the arbitrator's Final A ward. Defendant's motion to confirm the Partial and Final Awards is GRANTED.

Initials of
Preparer: ___

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF.CALIFORNIA

ENTERED
CLERK U.S. DISTRICT COURT
MAR. 5, 2007
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

CV 05-1292 DSF (JTLx)
March 1, 2007

SEVEN ARTS PICTURE, INC. et al.
v.
JONESFILM

CIVIL MINUTES-GENERAL

Present: The Honorable DALE S. FISCHER, United States District Judge

Paul D. Pierson, Deputy Clerk
Not Present: Court Reporter
Attorneys Present for Plaintiffs: Not Present
Attorneys Present for Defendant: Not Present

Proceedings: (In Chambers) Order DENYING Plaintiffs' Motion for Summary Judgment and Consolidating CV 06-2387-DSF (JTLx) with this Case.

This matter is currently before the Court on Plaintiffs Seven Arts Pictures, Inc., Seven Arts Filmed Entertainment Ltd., and Seven Arts Pictures PLC's Motion for Summary Judgment ("Motion"). By

this Motion, Plaintiffs seek to vacate an arbitration award recently issued against them. (See Goldin Decl., Ex. A.) The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. The hearing set for March 5, 2007 is removed from the Court's calendar. For the same reasons discussed in the Court's March 5, 2007 Order Denying Plaintiffs' Motion for Summary Judgment, issued in the companion case Hoffman v. Jonesfilm, CV 06-2387 DSF (JTLx), Plaintiffs' Motion is DENIED.

Case No. CV 06-2387-DSF (JTLx) is ordered consolidated with this case for all further proceedings.

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

Initials of Deputy Clerk: _____

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF.CALIFORNIA

ENTERED
CLERK U.S. DISTRICT COURT
MAR. 6, 2007
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

CV 06-2387 DSF (JTLx)
March 1, 2007

SEVEN ARTS PICTURE, INC. et al.
v.
JONESFILM

CIVIL MINUTES-GENERAL

Present: The Honorable DALE S. FISCHER, United States District Judge

Paul D. Pierson, Deputy Clerk
Not Present: Court Reporter
Attorneys Present for Plaintiffs: Not Present
Attorneys Present for Defendant: Not Present

Proceedings: (In Chambers) Order DENYING Plaintiffs' Motion for Summary Judgment and Consolidating CV 05-1292 DSF (JTLx).

This matter is currently before the Court on Plaintiffs Peter Hoffman and CineVisions' Motion for Summary Judgment ("Motion"). The Court deems this matter appropriate for decision without oral

argument. See Fed. R. Civ. P. 78; Local Rule 7-15. The hearing set for March 5, 2007 is removed from the Court's calendar. For the reasons discussed below, the Court DENIES the Motion.

The Court previously held that the parties' dispute was arbitrable, and was governed by either the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, or California law[1]. (March 8, 2006 Order Granting Defendant's Motion to Stay Proceedings Pending Arbitration 8-9, issued in consolidated case no. 05-1292 DSF (AJWx).) The Court stayed the instant action pending completion of the arbitration. (Id. at 14.) On January 16, 2007, the arbitration was concluded and the arbitrator issued a final award. (Hoffman. Decl., Ex. 18.) Plaintiffs now seek declaratory relief that the arbitration award is unenforceable. (Mot. 2.) Plaintiffs contend that the claims asserted in the arbitration are barred by (1) res judicata, (2) the statute of limitations, (3) due process, (4) California Code of Civil Procedure § 1021, and (5) California Civil Code § 1717. (M,)

A motion for summary judgment is an improper vehicle for obtaining the relief Plaintiffs seek. Plaintiffs are, in effect, seeking to vacate the arbitrator's award. Vacatur of an arbitrator's ruling is properly obtained through a motion to vacate. See 9 U.S.C. § 10; Cal. Code Civ. Fmc. §1286.2. Courts review an arbitrator's findings of fact and conclusions of law using an extremely deferential standard: a federal court may vacate or modify an arbitration

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[1] The Court declined to make a final choice of law determination after concluding that same result would be dictated under either federal or California law.

award *only* if the award is completely irrational, exhibits a manifest disregard of law, or otherwise falls within one of the grounds set forth by the FAA or California Code of Civil Procedure § 12862. G.C. & K.B. Invs .. Inc. v. Wilson, 326 F.3d 1096, 1105 (9th Cir. 2003); Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 11, 27 (1992). The standard of review on summary judgment is markedly different. See Fed. R. Civ. P. 56(c) (indicating that summary judgment shall be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"). Plaintiffs are not entitled to summary judgment on the issues presented in the instant motion. The Motion for Summary Judgment is DENIED.

This action was ordered consolidated with Case No. CV 05-1292 DSF (JTLx). No further documents are to be filed in this action. All documents shall be filed in Case No. CV 05-1292 DSF (JTLx).

Initials of Deputy Clerk: _____

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF.CALIFORNIA

DOCKETED ON CM
MAY, 12, 2006
BY 176

CV 05-1292 DSF (JTLx)
May 12, 2006

SEVEN ARTS PICTURE, INC. et al.
v.
JONESFILM

CIVIL MINUTES-GENERAL

Present: The Honorable DALE S. FISCHER, United States District Judge

Paul D. Pierson, Deputy Clerk
Not Present: Court Reporter
Attorneys Present for Plaintiffs: Not Present
Attorneys Present for Defendant: Not Present

Proceedings: (In Chambers) Order DENYING Plaintiffs' Motion Clarification and/or Reconsideration.

On March 8.2006, the Court issued an order granting Defendant's Motion to Dismiss Second Amended Complaint for Declaratory Judgment, or, Alternatively, to Stay Proceedings Pending Arbitration. On March 20, 2006, Plaintiffs filed a Motion for Clarification and/or Reconsideration of This Court's Order of March 6 (sic], 2006 ("Motion").

Jonesfilm's Opposition Brief to Plaintiffs' Motion for Clarification and/or Reconsideration of This Court's March 2006 Order was filed on April 28, 2006. Plaintiffs' Reply to Jonesfilm's Opposition to Plaintiffs' Motion for Clarification and/or Reconsideration of March 8 Order was filed on May 9, 2006. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15.

Having considered the papers submitted by the parties, the Court DENIES the Motion. The Court denies Defendant's request for sanctions under Local Rule 83.7.

Initials of
Preparer: _____

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF.CALIFORNIA

DOCKETED ON CM
MAR., 9, 2006
BY 012

CV 05-1292 DSF (JTLx)
March 8, 2006

SEVEN ARTS PICTURE, INC. et al.
v.
JONESFILM

CIVIL MINUTES-GENERAL

Present: The Honorable DALE S. FISCHER, United States District Judge

Paul D. Pierson, Deputy Clerk
Not Present: Court Reporter
Attorneys Present for Plaintiffs: Not Present
Attorneys Present for Defendant: Not Present
Not Present
Proceedings: (In Chambers) Order GRANTING Defendant's Motion to Stay Proceedings Pending Arbitration

I. INTRODUCTION

This case is currently before the Court on Defendant's Motion to Dismiss Second Amended Complaint for Declaratory Judgment, or, Alternatively, to Stay Proceedings Pending

Arbitration ("Motion to Stay"), filed September 6, 2005. Plaintiff' s (sic) Opposition ("Opposition") was filed September 19, 2005. Defendant's Reply ("Reply") was filed September 26, 2005.

Plaintiffs filed a Third Amended Complaint ("TAC") on February 9, 2006. Accordingly, Defendant's Motion to Dismiss Second Amended Complaint is now moot. The Court considers only Defendant's Motion to Stay Proceedings Pending Arbitration.

Having carefully considered all of the papers submitted by the parties, and having heard the oral argument of counsel, the Court GRANTS Defendant's Motion to Stay.

II. FACTUAL AND PROCEDURAL BACKGROUND

The following summarizes the facts as the Court currently understands them. The Court assumes these facts to be true for purposes of this motion only.

A. Assignment From Jonesfilm to NTTS/CineVisions

Defendant Jonesfilm is a joint venture composed of two constituent corporations: Sidney Kimmel Presentations Inc. and SKPI Corp. (Goldin Decl. ¶4.) In the mid-1980s, Defendant Jonesfilm produced a motion picture entitled *9 ½ Weeks* (the "First Picture"). (Goldin Decl. ¶15.)[1] During 1995,

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[1] Unless another date is specified, all references to the "Golding Declaration" and the exhibits thereto refer to the Declaration of Barry L. Goldin dated November 15, 2005 and

Jonesfilm entered into negotiations regarding a transfer of sequel rights to the First Picture to NTTS Productions Ltd. ("NTTS") and CineVisions. (Goldin Decl. ¶17.) CineVisions, a company established and owned by Peter M. Hoffman ("Hoffman") and his ex-wife, Susan Hoffman, was the parent company of NTTS through December 12, 1995. (Goldin Decl. Ex. 15 at 11:23-12:1.) NTTS is now owned by Compagne Europeene des Dorts ("CEDD"), a British Virgin Islands company. (Goldin Decl. Ex. 9.) Both CineVisions and NTTS now appear to be inactive companies. (Goldin Decl. ¶¶ 33, 50 n.3.)

These negotiations resulted in several agreements. First, NTTS executed an agreement with CineVisions (the "CV/NTTS Assignment") dated October 1, 1995. (Goldin Decl. Ex. 7.) Under the CV/NTTS Assignment, CineVisions assigned to NTTS all rights in an original screenplay for a sequel to the First Picture. (Goldin Decl. Ex. 7.)

The principal agreement between Jonesfilm and NTTS (the "JF/NTTS Agreement") is dated October 15, 1995. (Goldin Decl. Ex. 4.) The JF/NTTS Agreement gave NTTS the exclusive right to produce and exploit the sequels to the First Picture, and to use for production and marketing purposes all property relating to the First Picture, such as footage or music. (Goldin Decl. Ex. 4 at 1.) If NTTS failed to arrange financing for the first sequel by December 15, 1995 or to commence principal photography by January 30, 1996, all rights granted to NTTS would

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filed with this court on February 9, 2006 together with the Supplemental Brief of Defendant Jonesfilm as to Whether the Court Should Defer to the Arbitrator's Determination.

revert to Jonesfllm. (Goldin Decl. Ex. 4 ¶9.) If the first sequel was produced and delivered by December 31, 1996, then NTTS would have the right to produce additional sequels on the same terms as the first sequel, subject to good faith negotiation as to the compensation to be paid to Jonesfilm. (Goldin Decl. Ex. 4 ¶10.)

The JF/NTTS Agreement was signed by NTTS, CineVisions and Jonesfilm. (Goldin Decl. Ex. 4 at 10.) CineVisions is a "joint and several obligor of all liabilities and agreements" of NTTS under the contract. (Goldin Decl. Ex. 4. ¶15.) The JF/NTTS Agreement does not contain express provisions for assignment by NTTS to third parties; however, it does state that "[a]ny transfer, mortgage, assignment or other disposition of any sequel rights shall be subject to [Jonesfilm's] rights hereunder." (Goldin Decl. Ex. 4 ¶10.)

The JF/NTTS Agreement provides that it is to be governed by California law. (Goldin Dec1. Ex. 4 ¶14.) It also states that "[i]n the event of any dispute between the parties relating to the subject matter hereof, the parties hereby agree that any and all such disputes shall only be resolved by binding arbitration ... pursuant to the arbitration provisions of the American Film Marketing Association Arbitration Tribunal." (Goldin Decl. Ex. 4 ¶14.) The American Film Marketing Association ("AFMA.") is now known as the Independent Film & Television Alliance ("IFTA"). (Goldin Decl. Ex. 55.)

In addition to the CV/NTTS Assignment and the JF/NTTS Agreement, the parties also entered into several related agreements. In a Short Form

Assignment, dated October 15, 1995, Jonesfilm granted to CineVisions or its designee, and its representatives; successors, and assigns, all rights to the sequel to the First Picture. (Goldin Decl. Ex. 6.)

Under the JF/NTTS Agreement, NTTS was to grant Jonesfilm a security interest in the first sequel and the proceeds therefrom. (Goldin Decl. Ex. 4 ¶3(C).) Accordingly, Jonesfilm and NTTS entered into a Security Agreement dated October 15, 1995. (Goldin Decl. Ex. 5.) NTTS also executed a Mortgage of Copyright on October 15, 1995 in which it granted Jonesfilm a security interest in all copyrights in the first sequel. (Goldin Decl. Ex. 8.)

NTTS, CineVisions, and Jonesfilm signed an additional agreement dated November 13, 1995 relating to certain details of production. (Goldin Decl. Ex. 4 at 14-15.)

Finally, on November 22, 1995, NTTS and CineVisions entered into a Distribution Agreement ("NTTS/CV Distribution Agreement"). (TAC Ex. B; Hoffman Decl. Ex. 2, Sept. 19, 2005.) The NTTS/CV Distribution Agreement refers to an October 15, 1995 production agreement between NTTS and Odessa Film, a French company. (TAC Ex. B.) Under the NTTS/CV Distribution Agreement, NTTS and Odessa granted to CineVisions the right to distribute and exploit the Second Picture for a term of 20 years, to be automatically renewed for two further 20-year periods unless CineVisions gave a notice of termination. (TAC Ex. B ¶¶1.1, 3.1, 3.2.) NTTS retained a security interest in the Second Picture. (TAG Ex. B, ¶8.3.) CineVisions had the right to assign its rights and obligations under the

agreement, with the consent of NTTS and Odessa Film; similarly, either NTTS or Odessa Film had the right to assign its rights and obligations with the consent of CineVisions. (TAC Ex. B ¶9.3.) CineVisions also had the right to enter into sub-distribution and licensing agreements, even if those agreements extended beyond the term of the NTTS/CV Distribution Agreement. (TAC Ex. B ¶5.2.) The NTTS/CV Distribution Agreement is governed by California law. (TAC Ex. B ¶9.6.) The precise scope of the rights assigned under the NTTS/CV Distribution Agreement or subsequent agreements is unclear. Although NTTS appears to have retained a security interest and the rights would presumably revert to NTTS once the term was complete, Hoffman has testified that NTTS transferred all of its rights to CineVisions. (Goldin Decl. Ex. 15 at 19:21-:23.)

It appears that on January 1, 2002, NTTS also assigned to CineVisions the copyright in the Second Picture (PIs.' Opp'n to Supp. Brief); however, Plaintiffs have not provided evidence of this agreement.

During 1996, NTTS actually produced the first sequel (the "Second Picture"), a film variously identified as *9 ½ Weeks II, Another 91/2 Weeks, or Love in Paris*. (Goldin Decl. ¶18.) Hoffman's law firm filed a Copyright Registration Application to register the Second Picture in the name of NTTS. (Goldin Decl. Ex, 10 at 3-5.)

B. Assignment from NTTS to Cinepix/Lions Gate.

During 1997, NTTS entered into an agreement (the "NTTS/Cinepix Agreement") with Cinepix Film

Properties, Inc. ("Cinepix"). (Goldin Ex. 17 Ex. B.) Under the NTTS/Cinepix Agreement, Cinepix acquired the right to produce and exploit two new motion pictures, using the title *9 ½ Weeks* and the themes and characters from the Second Picture. (Goldin Decl. Ex. 17 Ex. E.) Cinepix was granted the right to license or distribute all rights in or to the new sequels. (Goldin Decl. Ex. 17 Ex. B ¶6.) If Cinepix did not commence principal photography of at least one additional sequel by June 30, 1998, all rights under the NTTS/Cinepix Agreement would revert to NTTS. (Goldin Decl. Ex. 17 ¶7.) The NTTS/Cinepix Agreement contains the following representations: (1) NTTS "is the sole and exclusive owner of all rights, title and interest in and to the Rights granted to" Cinepix; (2) the "Rights and all other materials assigned hereunder are fully assignable by" NTTS to Cinepix; (3) NTTS "has the full right and authority to enter into this Agreement"; (4) NTTS "has performed or will validly perform all of its obligations under and pursuant to any and all agreements with third parties relating to the rights granted hereunder" and the Second Picture; and (5) NTTS "has not granted assigned, mortgaged, pledged or hypothecated in any right, title or interest of any kind whatsoever in or to the [Second] Picture granted and/or agreed to be granted to" Cinepix. (Goldin Decl. Ex. 17 Ex. B ¶3(A)-(D), (H).) The NTTS/Cinepix Agreement contains a choice of law clause providing that the law of Canada Shall govern, and an arbitration clause providing for binding arbitration in the city of Toronto pursuant to Ontario's Arbitration Act. (Goldin Decl. Ex. 17 Ex. B ¶11.) Jonesfilm contends that it was unaware of the NTTS/Cinepix Agreement, which it characterizes as a "secret agreement." (Goldin Decl, ¶22:) .

Cinepix later became part of Lions Gate Films, Inc. ("Lions Gate"). (Goldin Decl. ¶22.) Lions Gate licensed High Concept Productions, Inc. to produce a second sequel (the "Third Picture") using the *9 ½ Weeks* name. (Goldin Decl. ¶22 and Ex. 14 ¶4.) Jonesfilm characterizes the Third Picture as a "low budget" film. (Goldin Decl. ¶22.)

C. Assignments to the Seven Arts Companies

A series of assignments were executed resulting in the transfer of the rights in the Second Picture from CineVisions to Seven Arts Pictures PLC, a British company.

Cine Visions first transferred the rights in the Second Picture to Seven Arts Pictures, Inc. ("Seven Arts"), a company formed in 2002 and owned by Hoffman, his ex-wife, and Fine Line Entertainment. (Goldin Decl. Ex. 38 at 14:18-:24, 77:22-:23.) There is currently a legal dispute as to whether Fireworks Entertainment, Inc. also owns part of Seven Arts. (Goldin Decl. Ex. 15 at 12:4-: 12.) The transfer to Seven Arts appears to have taken place on October 1, 2002. (Hoffman Decl. ¶3, Jan. 25, 2006.)

Seven Arts then transferred the rights in the Second Picture to Seven Arts Filmed Entertainment Limited ("SAFE"), a British limited liability company formed sometime around August 9, 2004. (Goldin Decl. ¶57(ii) and Ex. 28 at 5, 7.) The date of this transfer is unclear, although the Asset Transfer Agreement provided by Defendants appears to be dated October 2003. (Goldin Decl. Ex. 30.) Under the Asset Transfer Agreement, SAFE acquired all of Seven Arts' rights to certain projects in development

and existing motion pictures, including the Second Picture. (Goldin Decl. Ex. 30 ¶2.1 and Ex. B.) SAFE agreed to take the assignment subject to "all of the obligations, responsibilities and liabilities of Seven Arts pursuant to" any existing agreements for exploitation of the motion pictures. (Goldin Decl. Ex. 30 ¶¶1.l(b), 2.2:) In exchange for those rights, Seven Arts acquired all of the stock of SAFE. (Goldin Decl. Ex. 30 ¶2.5.)

Finally, the rights in the Second Picture were transferred to Seven Arts Pictures PLC, a British company formerly known as Cabouchon PLC. As part of this transaction, Cabouchon PLC changed its name to Seven Arts Pictures' PLC and became a subsidiary of Seven Arts, with Seven Arts owning 72.8% of the shares of Seven Arts Pictures PLC. (Goldin Decl. Exs. 28, 31.) Hoffman became CEO and a member of the board of directors. (Goldin Decl. Ex. 29.) SAFE in turn became a wholly-owned subsidiary of Seven Arts Pictures PLC. (Goldin Decl. Exs. 28, 31.) Seven Arts Pictures PLC acquired SAFE's rights in a number of current projects and completed films, including the Second Picture. (Goldin Decl. Exs. 28, 31.)

Thus, after the transfers, SAFE is a wholly-owned subsidiary of Seven Arts Pictures PLC, which itself is owned in substantial part by Seven Arts. Hoffman is a shareholder of Seven Arts and is CEO of all three companies. (Hoffman Decl. Oct. 5, 2005.) The distribution rights to the Second Picture are purportedly held by Seven Arts Pictures PLC.

D. Jonesfilm/NTTS Arbitration

Jonesfilm did not discover that Lions Gate had produced the Third Picture until June 28, 2001. (Goldin Decl. Ex. 36 Ex. B at 5.) Jonesfilm filed suit against Lions Gate and its associates in the Southern District of New York on July 26, 2001. (Goldin Decl. Ex. 36 Ex. B at 5.) On January 3, 2003, the district court granted the defendants' motion to compel arbitration. (Goldin Decl. Ex. 16.) Lions Gate commenced AFMA arbitration in Los Angeles on January 14, 2003 against Jonesfilm and NTTS, seeking a declaratory judgment. (Goldin Decl. Ex. 36 Ex. B at 3.) NTTS filed a cross-claim against Jonesfilm; Jonesfilm filed counterclaims against Lions Gate and NTTS. (Goldin Decl. Ex. 36,)

By 2001, NTTS had ceased to be an active company or to hold any assets. (Goldin Decl. Ex. 15 at 19:21-23, 21: 17-23.) It appears that Hoffman and his other companies pursued the AFMA arbitration in the name of NTTS. (Goldin Decl. ¶¶32 n.2, 37.) Hoffman has testified that he operated under a power of attorney from NTTS. (Goldin Decl. Ex. 15 at 14:4-:16.)

The Arbitrator's Findings and Award were issued on July 20, 2004; an Order Correcting Findings and Award was issued on August 31, 2004. (Goldin Decl. Ex. 36 Ex. B.) The arbitrator's decision was confirmed in an Order and Judgment Confirming Arbitration Award issued by the Los Angeles County Superior Court dated December 8, 2004, and an amended order and judgment dated March 18, 2005. (Goldin Decl. Exs. 33, 36.)

The arbitrator found that Hoffman had apparent authority to act on behalf of NTTS. (Goldin

Decl. Ex. 36 Ex. B at 7.) The arbitrator upheld NTTS' and Lions Gate's sequel rights to produce and distribute the Third Picture. (Goldin Decl. Ex. 36 Ex. B at ¶14.) However, the arbitrator then found that NTTS had never negotiated a purchase price for the Third Picture with Jonesfilm, as required by the JF/NTTS Agreement; thus NTTS had breached the agreement by authorizing production of the Third Picture. (Goldin Decl. Ex. 36 Ex. B ¶¶11-12.) Furthermore, the arbitrator found that Hoffman had improperly diverted funds paid by Cinepix to NTTS that were intended to satisfy the obligations to Jonesfilm under the JF/NTTS Agreement. (Goldin Decl. Ex; 36 Ex. B ¶¶15-16.) The arbitrator found yet another breach of the JF/NTTS Agreement in NTTS' failure to consult with Jonesfilm and obtain its approval for various production decisions. (Goldin Decl. Ex. 36 Ex. B ¶¶19-20.) Because Jonesfilm had a security interest in the rights granted to NTTS under the JF/NTTS Agreement, Jonesfilm was entitled to foreclose on those rights. (Goldin Decl. Ex. 36 Ex. B ¶23.) Furthermore, because no principal photography had been commenced on any new sequels within the past five years, the rights to any additional sequels had already reverted to Jonesfilm under the JF/NTTS Agreement. (Goldin Decl. Ex. 36 Ex. B ¶25.) However, the arbitrator found it inappropriate to allow the foreclosure to affect the rights of innocent third parties. (Goldin Decl. Ex. B ¶23.) Thus all of NTTS' rights in the Second and Third Pictures, as well as any further sequels, reverted to Jonesfilm; however, Lions Gate and other third party distributors retained those rights that had been transferred to them. (Goldin Decl. Ex. B, 23.) The arbitrator specifically noted that the copyright in the Second Picture had been transferred

from NTTS to Cine Visions, and then to Seven Arts; however, the arbitrator ruled that he did not have jurisdiction to proceed against those companies. (Goldin Decl. Ex. 36 Ex, B ¶23.)

On September 7, 2004, Jonesfilm sent separate letters to NTTS and CineVisions, both directed to Hoffman, demanding compliance with the arbitrator's award. (Goldin Decl. Ex 22.) Hoffman replied by stating that neither he nor Seven Arts had any responsibility for the debts of NTTS or CineVisions; he also asserted that the rights in the) Third Picture were held by Seven Arts Pictures PLC. (Goldin Decl. Exs. 23, 27.)

The state court confirmed the arbitrator's ruling, awarding damages to both Jonesfilm and Lions Gate. (Goldin Decl Ex. 36 at 2-3.) The court stated that "Jonesfilm owns all future sequel and prequel rights" in all three motion pictures. (Goldin Decl. Ex. 36 at 5.) The court then stated: "All third party distribution rights in the Second Picture and the Third Picture shall remain in full force and effect, provided that Jonesfilm shall have the right to obtain appropriate judicial relief relating to any transfers by NTTS to Peter Hoffman, CineVisions, Seven Arts and/or Fireworks." (Goldin Decl. Ex: 36 at 4.)

The state court also granted Jonesfilm's motion to add Hoffman as a cross- defendant and a judgment debtor. (Goldin Decl. Exs. 34, 36.) Hoffman was included as a judgment debtor "as the alter ego to NITS" and was made jointly and severally liable for all of NTTS' obligations under the award. (Goldin Decl. Ex. 36 at 6.) The state appellate court denied

Hoffman's petitions for relief. (Goldin Decl. ¶74.) E. Current Litigation ,

Seven Arts, CineVisions, and Hoffman filed a Complaint for Declaratory Relief against Jonesfilm on February 18, 2005, and a Corrected Complaint on March 14, 2005. In an order dated May 19, 2005, the Court dismissed the action with leave to amend for lack of subject matter jurisdiction; the Court held that it lacked jurisdiction based on copyright issues, and that diversity jurisdiction had not been adequately pleaded. Seven Arts, CineVisions, and Hoffman filed a First Amended Complaint on June 7, 2005. In an order dated July 26, 2005, the Court again dismissed the action with leave to amend. The Court found that the plaintiffs had inadequately alleged diversity jurisdiction, and that jurisdiction was barred by the Rooker-Feldman doctrine, which provides that federal district courts may not hear cases that are essentially appeals of state court decisions.

On August 5, 2005, Jonesfilm served a Notice of Arbitration against Seven Arts, SAFE, CineVisions, and Seven Arts Pictures PLC. (Goldin Decl. Ex 1.) An arbitrator was designated and the dispute proceeded to arbitration.

On August 25, 2005, a Second Amended Complaint was filed by Seven Arts and SAFE. On September 6, 2005, Jonesfilm filed a motion to dismiss the action or stay the proceedings. In addition to its arguments for dismissal, Jonesfilm contends that Plaintiffs are bound by the arbitration clause in the JF/NTTS Agreement. Oral argument was heard on October 3, 2005, and the Court took the

matter under submission. On December 5, 2005, the Court ordered the parties to submit simultaneous briefing on the issue of subject matter jurisdiction, or a stipulation setting forth facts sufficient to establish jurisdiction. Defendant filed a Proposed Stipulation and Order on January 17, 2006. On February 9, 2006, the Court entered a Stipulation and Order for Filing Third Amended Complaint. Plaintiffs Seven Arts, SAFE, and Seven Arts Pictures Plc filed a Third Amended Complaint on February 9, 2006. The Third Amended Complaint seeks a declaration that Plaintiffs own an interest in the Second Picture and may freely exploit their rights without infringing the rights of Jonesfilm or its assignees. (TAC ¶15.)

Meanwhile, on November 1, 2005, Arbitrator Stephen S. Strick had ruled that he had the power to determine his own jurisdiction. The Arbitrator ordered supplemental briefing, and subsequently ordered the parties to proceed to arbitration, absent a valid court order staying the proceedings. On January 24, 2006, the Court ordered the parties to submit simultaneous briefing by February 9, 2006 as to whether the Court should defer to the Arbitrator's determination. The Supplemental Brief of Defendant Jonesfilm as to Whether the Court Should Defer to the Arbitrator's Determination ("Defendant's Supplemental Brief') was filed on February 9, 2006; Plaintiffs filed an opposition to that brief ("Plaintiffs' Opposition to Supplemental Brief,) on February 27, 2006.

Plaintiffs also filed a Motion for a Preliminary Injunction Against Purported Arbitration on February 2, 2006. Defendant filed an opposition on February 17, 2006.

III. DISCUSSION

A. Subject Matter Jurisdiction

The Court first considers whether it has jurisdiction to rule on Defendant's Motion to Stay. According to the allegations the TAC, Plaintiff Seven Arts is a Nevada corporation with its principal place of business in California. (TAC ¶7.) Plaintiff SAFE is a corporation organized in England with its principal place of business in England. (TAC ¶7.) Plaintiff Seven Arts Pictures PLC is also a corporation organized in England with its principal place of business in England. (TAC ¶7.) Defendant Jonesfilm is a joint venture organized in Pennsylvania with its principal place of business in Pennsylvania. (TAC ¶8.) It is composed of two constituent corporations: Sidney Kimmel Presentations Inc. and SKPI Corp. (TAC ¶8.) Each of these corporations is organized in Delaware and has its principal place of business in Pennsylvania. (TAC ¶8.) According to Plaintiffs the current value of the rights in dispute, namely the distribution rights to the Second Picture, is over $750,000. The Court finds that the requirements for diversity jurisdiction under 28 U.S.C. § 1332(a) are met.

B. Choice of Law

Defendant has persuasively argued that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, applies here. The FAA applies to an arbitration agreement in any contract "evidencing a transaction involving commerce." 9 U.S.C. § 2. Defendant alleges that the Second Picture has been and is being distributed in interstate commerce through video

stores, television, and other means of distribution. Plaintiffs' argument that the FAA is inapplicable is based on a misreading of Volt Information Sciences, Inc, v. Board of Trustees, 489 U.S. 468 (1989). In Volt, the Supreme Court held that the FAA did apply to a contract involving interstate commerce, although the contract was governed by California law; however, the FAA did not completely pre-empt California's arbitration statutes.

Both parties also seek to apply provisions of California law, with conflicting results. The analysis of whether California law applies, and if so, what provisions pertain here is somewhat tortuous. The Court need not detail that analysis here because it disagrees with Plaintiffs' arguments that application of California law would ultimately dictate a different result.

C. Stay Pending Arbitration

The FAA allows the Court to stay an action "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under [a written] agreement." 9 U.S.C. §3. In ruling on a motion to stay pending arbitration, "the court's role ... is limited to (l) determining whether a valid agreement to arbitrate exists and, if it does, (2) deciding whether the agreement encompasses the dispute at issue." Fujian Pac. Elec. Co. Ltd. v. Bechtel Power Corp., No. C 04-3126 MHP, 2004 WL 2645975 (N.D. Cal. Nov. 19, 2004) (citing Simula, Inc. v. Autoliv. Inc., 175 F.3d 716, 719-20 (9th Cir. 1999)). More generally, the Court has the inherent power to grant a stay in a case before it "to control the disposition of the causes on its docket with economy

of time and effort for itself, for counsel, and for litigants." Landis v. N. Am. Co., 299 U.S. 248, 254 (1936). In making its decision, the court must "weigh competing interests and maintain an even balance." Id.

In its Motion to Stay, Jonesfilm argues that Plaintiffs are bound by the arbitration clause in the JF/NTTS Agreement Plaintiffs respond that, as non-signatories to the JF/NTTS Agreement, they cannot be compelled 'to arbitrate this dispute.

In First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), the Supreme Court identified three distinct layers of disagreement that may exist in a dispute involving arbitration. First, the parties may disagree as to the merits of the dispute. Second, the parties may disagree as to whether they agreed to arbitrate the merits. Third, the parties may disagree as to who should decide the second question. Id. at 942. All three layers are present in this case. The underlying dispute here is whether Plaintiffs still hold rights in the Second Picture, given the resolution of the Jonesfilm/NTTS arbitration. Defendant's Motion to Stay raises a dispute as to the second layer identified in First Options - that is, whether Plaintiffs ~e bound by the arbitration clause in the JF/NTTS Agreement to arbitrate the merits. Finally, the arbitrator's decision that the merits are arbitrable raised a third question: whether the Court or the arbitrator should decide arbitrability.

The Court must now consider the third and the second questions in turn. That is, the Court must first determine who should rule on arbitrability. If the question is one for the Court, then the Court

must determine whether Plaintiffs are required to arbitrate the dispute. As will be discussed further below, both questions turn on the agreement between the parties.

1. Generally, the Court Must Decide the Question of Who Should Rule on Arbitrability

Under the FAA, "there is a general presumption that the issue of arbitrability should be resolved by the courts." Contee Corp. v. Remote Solution Co . Ltd:, 398 F.3d 205, 207 (2d Cir. 2005). The question of arbitrability "may only be referred to the arbitrator if there is clear and unmistakable evidence from the arbitration agreement, as construed by state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator. Id. (citation and internal quotation marks omitted). Accord Apollo Computer, Inc. v. Berg. 886 F.2d 469,'472-73 (1st Cir. 1989). California applies the same rule. See Dream Theater. Inc. v. Dream Theater, 124 Cal. App. 4th 547, 552-53 (2004); Parker v. Twentieth Century-Fox Film Corp., 118 Cal. App. 3d 895, 904 (1981).

The question of who decides arbitrability depends on the agreement between the parties. First Options of Chicago, Inc 514 U.S. 938; 943 (1995). If the parties agreed to submit that question to the arbitrator, then the court should defer to the arbitrator. Id. "If, on the other hand, the parties did *not* agree to submit the arbitrability question to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently," Id.

Ambiguities are resolved in favor of leaving the determination to the courts; "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so," Id, at 944 (citations and internal quotation marks omitted).

The parties may agree to submit the arbitrability question to the arbitrator either expressly in the contract itself, or through subsequent actions in arbitration proceedings.

It is unclear whether the parties expressly elected to have the arbitrator rule on arbitrability. After an analysis of the JF/NTTS Agreement and the potential applicability of the IFTA Rules for International Arbitration, the Court concludes the issue of arbitrability here is one for the Court. Because the Court further concludes the matter is arbitrable, it need not discuss the reasons for its choice.

As for implicit consent, Plaintiffs have continually objected to the arbitration, and thus to the determination of the question of arbitrability by the arbitrator. This issue deserves no further discussion.

2. Deference to the Arbitrator's Ruling

This case comes to the Court in a peculiar posture because the arbitrator has already made a determination of arbitrability. Defendant contends that the Court should now defer to the arbitrator's ruling. See Wash. Square Sec., Inc. v. Sowers, 218

Supp. 2d 1108, 116 (D. Minn. 2002). In Wash. Square, however, the court noted that two circuit courts had previously determined that similar cases were arbitrable; thus the arbitrator's decision was likely to be correct. See also United Parcel Serv" Inc. v. Union de Tronquistas de P.R.· Local 901, 426 F.3d 472 (1st Cir. 2005) (holding that the court, rather than the arbitrator, should have ruled on arbitrability, but finding only harmless error because the arbitrator's determination was correct). Here the question is not so simple.

Defendants also cite several California cases setting out "a rule of substantial deference to the arbitrators' jurisdictional determinations." Ajida Techs,. Inc, v. Roos Instruments, Inc., 87 Cal. App. 4th 534,542 (2001) (quoting Advanced Micro Devices, Inc. v. Intel Com., 9 Cal. 4th 362, 374 (1994). A Court must "display[] substantial deference towards the arbitrator's determination of his or her contractual authority. All reasonable inferences must be drawn in support of the award." Jones v. Humanscale Corp, 130 Cal. App. 4th 401, 408 (2005) (citations omitted); accord Evans y. Centerstone Dev, Co., 134 Cal. App. 4th 151, 157 (2005); County of Solano v. Lionsgate Com., 126 Cal. App, 4th 741,746 (2005).

The cases cited are distinguishable because they involved review of an arbitrator's final award. Here, the arbitrator has not yet made an award; the arbitration is at a fairly early stage. Furthermore, even this deference· does not prevent a court from contradicting the arbitrator's finding. "[E]xcept where the parties have conferred upon the arbiter the unusual power of determining his own jurisdiction, the courts retain the ultimate authority to overturn

awards as beyond the arbitrator's powers ... " Ajida Techs, Inc., 87 Cal. App. 4th at 541. Indeed, Supreme Court precedent dictates that this Court must resolve doubts in favor of retaining jurisdiction to rule on arbitrability. First Options of Chicago, Inc., 514 U.S. at 944.

In any case, the Court need not decide on the standard of review applicable to the arbitrator's determination because, as discussed below, the Court agrees with the arbitrator's determination. .

3. The Dispute Is Arbitrable

It is undisputed that the JF/NTTS Agreement contains an arbitration clause requiring the parties to that agreement to submit to arbitration. It also appears undisputed that, through a series of transactions, at least some of the rights held by NTTS under the JF/NTTS Agreement were ultimately assigned to Seven Arts Pictures PLC. The question before the Court is whether Plaintiffs, who are nonsignatories to the JF/NTTS Agreement, are now bound by the arbitration clause.

The arbitrator in the original Jonesfilm/NTTS arbitration expressly stated that his ruling should not apply to Seven Arts or other third parties. However, this does not mean that Plaintiffs are not bound by that arbitration clause; it simply means that the arbitrator refrained from so holding during that arbitration. Indeed, the arbitrator did not have the power to bind Seven Arts; "an arbitrator has no power to determine the rights and obligations of one who is not a party to the ... arbitration proceedings." Carpenters 46 N. Cal. Counties Conference Bd. v.

Zweigle. 130 Cal. App. 3d 337, 343 (1982) (citation and internal quotation marks omitted).

In determining whether a nonsignatory is bound by an arbitration clause, the Court must focus on principles of contract construction. Banque de Paris et des Pays-Bas v. Amoco Oil Co., 573 F. Supp. 1464, 1469 (S.D.N.Y. 1983). "[D]oubts concerning the scope of arbitrable issues should be resolved iIi favor of arbitration." Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). However, although there is a strong public policy in favor of arbitration, that policy "does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration." Benasra v. Marciano, 92 Cal. App. 4th 987, 990 (2001).

Nevertheless, nonsignatories may be bound by arbitration provisions under certain circumstances. The Ninth Circuit has held that "nonsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles." Letizia v. Prudential Bache Sec., Inc., 802 F.2d 1185, 1187 (9th Cit. 1986) (citations omitted). "These principles include (1) incorporation by reference; (2) assumption; "(3) agency; (4) veil-piercing/alter ego; and (5) estoppel." Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc. 198 F .3d 88, 97 (2d Cir. 1999) (citation and internal quotation marks omitted). Thus "assignees of contracts containing arbitration provisions may become parties to such provisions." Fisser v. Int'l Bank, 282 F.2d 231, 233 n.6 (2d Cir. 1960). When a plaintiff acquires rights under a contract as an

assignee, and "bases its rights to sue on the contract itself,... the provision requiring arbitration as a condition precedent to recovery must be observed." Cheshire Place Assocs. v. W. of Eng. Ship Owners Mutl. Ins. Ass'n (Lux.). 815 F. Supp. 593, 597 (E.D.N.Y. 1993) (citations and internal quotation marks omitted). Otherwise, "arbitration provisions, would be of no value if a party could escape the effect of such a clause by assigning a claim subject to arbitration between the original parties to a third party." Banque de Paris et des PaysBas, 573 F. Supp. at 1470 (citation and internal quotation marks omitted). As Defendant points out, allowing a party to a contract to avoid its obligation to arbitrate simply by assigning its rights to a related entity would render arbitration clauses almost meaningless.

It is also an established principle of California law that the party who takes the benefit of a transaction must also bear the burden. Cal. Civ. Code §3521. "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." Cal. Civ. Code §1589. See also Foreman Roofing Inc. v. United Union Roofers. Local 36, 144 Cal. App. 3d 99, 107 (1983) ("[W]here it is clearly the intent of the parties, as manifested by their conduct ..., the assignee succeeds to the obligations of the contract."); Fanning v. Yoland Prods. Inc., 150 Cal. App. 2d 444,448-49 (1957) (discussing Cal. Civ. Code §§ 1589, 3521). The California cases cited by Plaintiffs are distinguishable because the nonsignatory parties were not deemed to have received a benefit stemming from the contract. See Contra Costa County v. Kaiser Health Plan, 47 Cal.

App. 4th 237,242 (1996) (noting that California cases have required a nonsignatory to arbitrate a claim "because a benefit was conferred on the nonsignatory as a result of the contract," but finding no such factor present); see also Buckner v. Tamarin, 98 Cal. App. 4th 140, 143 (2002) (finding no agency or other relationship justifying binding nonsignatory to arbitration); Arista Films. Inc. Employee Profit Sharing Plan v. Gilford Sec., Inc., 43 Cal. App. 4th 495, 502 (1996) (finding no third-party beneficiary status sufficient to bind nonsignatory to arbitration). These cases do not foreclose application of an arbitration clause to a nonsignatory in the presence of appropriate factors, such as estoppel, agency. or third-party beneficiary status.

Under the doctrine of equitable estoppel, "a party who has *not* signed a contract containing an arbitration clause may nonetheless be compelled to arbitrate when he seeks enforcement of other provisions of the same contract that benefit him." Metalclad Corp., 109 Cal. App. 4th at 1713 (citations omitted) (applying the FAA). In order to apply equitable estoppel to a nonsignatory, it is not enough that the nonsignatory be closely affiliated with another signing party, or that the merits of the claim be "inextricably intertwined" with the agreement containing an arbitration provision. Legacy Wireless Servs., Inc. y, Human Capital. L.L.C., 314 F. Supp. 2d 1045, 1056 (D. Or. 2004). Instead, the nonsignatory must have "obtained a direct benefit from the underlying contract, that is, a benefit flowing directly from the agreement." Id. (citation and internal quotation marks omitted).

Here, Plaintiffs seek a declaratory judgment that they hold rights in the Second Picture. Those rights stem from a series of transactions, beginning with the JF/NTTS Agreement. The JF/NTTS Agreement is essential to Plaintiffs' claims. Plaintiffs attempt to argue that neither NTTS nor CineVisions ever assigned the JF/NTTS Agreement to Plaintiffs; instead, Plaintiffs contend that Cine Visions assigned only its rights under the NTTS/CV Distribution Agreement. (PIs.' Opp'n to Supp. Brief 7-8.) However, those rights originated in the JF/NTTS Agreement; without that agreement, NTTS would never have had the right to produce the Second Picture to begin with, let alone assign distribution rights to it. Although the subsequent transfers to Plaintiffs were not expressly referred to as assignments of the JF/NTTS Agreement, they were nevertheless assignments of rights held under that agreement. All of Plaintiffs' rights flow directly from the underlying JF/NTTS Agreement. Thus Plaintiffs are bound by its arbitration clause. This conclusion is bolstered by the language of the contract itself. The JF/NTTS Agreement provides that "[a]ny transfer, mortgage, assignment or other disposition of any sequel rights shall be subject to [Jonesfilm's] rights hereunder." (Goldin Decl. Ex. 4 ¶10.) Jonesfilm's rights include the right to arbitration of any disputes under the contract.

In Banque de Paris, the court considered a similar factual scenario. There, the plaintiff was the assignee of a contract that contained a broad arbitration provision. The defendant, a party to the contract, sought to enforce the arbitration clause against the nonsignatory plaintiff. The court explained that although the plaintiff "never expressly

agreed to arbitrate,... it may be obliged to do so, if warranted under ordinary contract principles." Banque de Paris et des Pays-Bas, 573 F.Supp. at 1469 (citations omitted). Because the case was governed by the FAA, the court turned to the federal common law of contracts; and held that "an assignee or other party whose rights are premised on a contract is bound by the remedial provisions bargained for between the original parties to the contract." Id. Accordingly, the plaintiff was bound by the arbitration clause. Id. at 1466.

Admittedly, the contract in Banque de Paris provided for arbitration of any "controversy or claim arising out of or relating to this agreement or breach thereof ...," id. at 1468, while the JF/NTTS Agreement limits the arbitration requirement to "a dispute between the *parties."* (Goldin Decl. Ex. 4 ¶14 (emphasis added).) But Plaintiffs have not cited any authority limiting the holding of Banque de Paris to contracts containing its specific language. Through the assignment from CineVisions, Seven Arts and its assignees SAFE and Seven Arts Pictures PLC essentially. became parties to the JF/NTTS Agreement. Jonesfilm is entitled to enforce its right to arbitrate. (Goldin Decl. Ex. 4 ¶10) ("[a]ny transfer, mortgage, assignment or otb.er disposition of any sequel rights shall be subject to [Jonesfilm's] rights hereunder").

IV. CONCLUSION

For the reasons discussed above, the Court GRANTS Defendant's motion to stay proceedings pending arbitration. Because the Court grants a stay of the proceedings, Plaintiffs' Motion for a

Preliminary Injunction Against Purported Arbitration (Docket # 64) is DENIED as moot.

Initials of
Preparer: _____

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED
MAR 25 2009
MOLLY C DWYER, CLERK
U.S. COURT OF APPEALS

D.C. No. CV-05-01 292-DSF

SEVEN ARTS PICTURES PLC,
an English Corporation; et al.,
Plaintiffs - Appellants,
Cross- Appellees
v.
JONESFILM, a Pennsylvania joint venture,
Defendant - Appellee,
Cross-Appellant

Before: HALL, SILVERMAN, and CALLAHAN, Circuit Judges.

ORDER AMENDING MEMORANDUM DISPOSITION AND DENYING PETITION FOR PANEL REHEARING AND REHEARING EN BANC

The memorandum disposition filed on February 12, 2009, is hereby corrected as follows:

Page 4, lines 7-8, and line 13: "federal claims" is changed to "claims in federal court."

The panel has voted to deny appellant's petition for panel rehearing and has recommended denial of the petition for rehearing en banc. The full

court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED. No further petitions shall be entertained.